REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench:

FROM

HILARY TERM, the 14*th of* GEORGE *III.* 1774,

TO

TRINITY TERM, the 18*th of* GEORGE *III.* 1778.

Both Inclufive.

By HENRY COWPER, Efq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

SECOND EDITION;

IN TWO VOLUMES.

VOL. II.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

FOR E. AND R. BROOKE AND J. RIDER, BELL-YARD, TEMPLE-BAR.

1800.

EASTER TERM

16 GEORGE III. B. R. 1776.

DOE *ex dim.* DAVIS *versus* SAUNDERS.

Tuesday, April 30th. 1776.

N. B. Mr. Justice *Ashurst* was absent the whole of this term at *Bath*.

One devises a *reversion* to his *right heirs*, and afterwards gives all the *residue* and remainder of his real and personal estate to *A. B.* in fee. The *reversion* does not pass by the residuary devise.

IN ejectment for certain lands in *Edmonton*, in the county of *Middlesex*, upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case.

That *Robert Everden* being seised in fee of the premises in question, and of other lands (copyhold), devised the lands in question, *viz.* a freehold messuage and premises in *Church-street* in *Edmonton*, and also a parcel of land copyhold in *Barrowfield* in the said parish, containing about half an acre, to his son *Henry Everden* and his wife *Elizabeth*, for their joint lives, and the survivor of them, and after the decease of the survivor, to their eldest son and his heirs for ever; and if they have no male issue, then to their daughters and their heirs for ever: and if they die without issue, then *to his right heirs for ever*. Afterwards he gave to his son-in-law *Humphry Davis*, his heirs, executors, administrators, and assigns for ever, *all and every his freehold and copyhold estate and estates*, tenements and premises thereunto belonging, not thereinbefore devised, to have and to hold to him, his heirs, and assigns for ever, upon trust to sell the same, so soon as conveniently might be after his decease: and after payment of so much of his debts, funeral and other expences, as his personal estate, before devised for that purpose, should not be sufficient to discharge, to pay certain legacies to his children, and the *rest, residue*, and *remainder thereof equally to divide amongst his children share and share alike*. And then he devised "*all the residue and* "*remainder of his estate, both real and personal, to his son-in-law*

1776. — DOE *versus* SAUNDERS.

"the said *Humphry Davis*, his heirs, executors, administrators, "and assigns for ever."

Henry Everden and his wife survived the testator, and died without ever having had issue.

The testator had six copyhold messuages, which were surrendered to the use of his will, but no other freehold estate besides that devised to *Henry Everden.*

The question was, Whether the plaintiff is entitled to recover; if not, then a nonsuit to be entered?

Mr. *Buller*, for the lessor of the plaintiff, stated the question to be, Whether by the limitation to the testator's right heirs, any estate passed or not; and he insisted no estate at all passed. That by a devise to the right heirs of a man, no interest whatever passes: That if the testator had stopped at the devise to the daughters, the reversion would have descended to the old uses. 2 *P. Wms.* 135. —3 *Lev.* 406. 2 *Salk.* 590. 10 *Mod.* 369. *Goodright* v. *Wright.* 1 *P. Wms.* 397. *S. C.* That if the testator meant any thing by the expression "*to his right heirs*," he must have meant such person as he should make his heir; namely, *Humphry Davis*: Such a construction would make the whole will consistent, and no doubt he meant to give a freehold to *Davis.* But, secondly, supposing the devises inconsistent, the devise to *Davis*, as being the last, ought to take effect.

Mr. *Davenport*, *contra*, cited *Smith ex dim. Davis* v. *Saunders*, *Hil.* 11 *Geo.* 3. *C. B.* which he said was this very case, upon an ejectment brought there; and the court held the reversion did not pass by the residuary devise. *Vide* this case since reported, 2 *Blackst. Rep.* 736.

Lord *Mansfield* to Mr. *Davenport.* I have looked at that case in the Common Pleas, and it is in point.

Lord *Mansfield*, after stating the case, proceeded thus; The question is, Whether the devise to *Humphry Davis* includes the reversion of the freehold messuage in *Church-street*, *Edmonton*, and the copyhold in *Barrowfield?*

This question depends upon whether the messuage and copyhold were within the intention of the testator devised by his will to his right heirs. If this case were doubtful, the authority of the court of *Common Pleas* ought to guide us; but there could be no doubt, if the question were *res integra*, that the clear intention of the testator was not to include the reversion of the premises in question, in the devise to his son-in-law *Humphry Davis.* For he first devises them to *Henry Everden* and his wife for

their

1776.

DOE *versus* SAUNDERS.

their joint lives, and to the furvivor; then to their eldeft fon and his heirs for ever, which would give him the fee; but that devife is followed by other words, which by implication fhew he meant his fon fhould only take an eftate tail, with remainder over to his daughters, and if they died without iffue, then the eftate was to go to his own right heirs. The whole reverfion, therefore, is clearly difpofed of.

It is true, where a man devifes lands to his right heirs abfolutely, the heir may take by defcent as being the better title; but where the lands fo devifed are fubject to a charge, he muft take under the will, that he may not defeat the will. What is the meaning here? The teftator fays, he means his heirs fhall take by defcent.—After this devife, he gives all his freehold and copyhold eftates to the leffor of the plaintiff. But he gives them for purpofes which fhew he could not mean to include this eftate: for he directs they fhall be fold *immediately* for payment of debts and legacies; and the refidue of the money arifing from the fale to be divided equally amongft his children. That could not be done in refpect of the eftate in queftion, till he knew whether his fon *Henry Everden* would have children or not. As to the fubfequent devife of the refidue, that cannot go further than the firft: it would be tautology and unintelligible, unlefs applied to the perfonal eftate. Therefore, both upon the authority of the determination in the *Common Pleas*, and independent of it, I am clearly of opinion that the leffor of the plaintiff has no title to recover.

ASTON Juftice—I am of the fame opinion: As to the fecond devife of the refidue, there is nothing for it to operate upon; for the whole is before devifed. And if the plaintiff's conftruction refpecting the devife to the right heirs being nugatory, were to prevail; *Davis* the truftee muft immediately fell the whole eftate, and *Henry Everden* would be to take only one eighth part of his own eftate.

Mr. Juftice *Willes* was of the fame opinion.

Per Cur. Let a nonfuit be entered.

FULL *verfus* HUTCHINS, Clerk.

Same day.

Prohibition denied after fentence, where the defendant below had fet up feveral cuftoms refpecting tithes, but had fubmitted to trial

HUTCHINS libelled *Full* in the ecclefiaftical court of the Archdeacon of *Totnefs* in *Devonfhire* for tithes. *Full* fet up a *modus*, and alfo feveral cuftoms, alleging their exiftence to have been from time immemorial, or at leaft for 40 years. The

 ecclefiaftical

1776. ecclefiaftical court proceeded to the examination of witneffes as to thefe fuppofed cuftoms, and pronounced fentence againft them. Upon this, *Full* applied for a prohibition, and a rule to fhew caufe was granted.

FULL *verfus* HUTCHINS.

Mr. *Buller* now fhewed caufe, and infifted, that this being an application for a prohibition *after fentence*, it ought to appear *upon the face of the libel*, that the ecclefiaftical court had *no* jurifdiction, otherwife a prohibition would not go: But here the objection clearly arifes upon a *collateral* matter. The party has fubmitted to trial, and the ecclefiaftical court have decided as a court of common law would have done. Therefore, the application is now too late. *Buggin* verfus *Bennet*, *Pafch.* 7 *Geo.* 3. *B. R.* fince reported 4 *Burr.* 2,053.—1 *Bur.* 813.—1 *Str.* 187. *Argyle* verfus *Hunt.* and 1 *Ventr.* 343. in which latter cafe it is faid, "it is *difcretionary* in the court to grant a prohibition."

Mr. *Dunning contra* contended, that the court below had *no* jurifdiction in this cafe; and, therefore, a prohibition might go at any time. For though the ecclefiaftical court has undoubtedly jurifdiction in matters of tithe, yet in this cafe there was a *modus* fet up, cuftoms ftated and denied, iffue joined upon them, and a general decree for payment. Now, a cuftom is a matter peculiarly triable at common law; and from the moment the queftion of *modus* or no *modus* was ftarted, there was an end of the jurifdiction of the ecclefiaftical court. The defence put the caufe upon a totally different ground, which it is the peculiar province of the common law jurifdiction to judge of. Therefore, a prohibition may go though after fentence. 6 *Mod.* 252. *Comb.* 254, 448. 1 *Bur.* 314. As to the cafe 1 *Ventr.* 343, in 1 *Sid.* 65. it is exprefsly laid down, "that the granting a prohibition is *not* "*difcretionary*, but *ex debito juftitiæ* *."—*Cur. advifare vult.*

* *Vide* Sir *Tho. Raym.* 7.

Next day Lord *Mansfield* delivered the opinion of the court as follows:

The cafe is, that the defendant *Hutchins* libelled in the ecclefiaftical court for tithes. *Full*, the plaintiff, fet up a *modus*, and feveral *cuftoms*, which he alleged to be *time immemorial*, or at leaft for *forty* years paft. Witneffes were examined, the caufe was heard, and fentence given againft the cuftoms. *Full* has now made application to this court for a prohibition upon the following ground: that his defence below was a plea of immemorial cuftoms; that an immemorial cuftom is a matter properly triable at common law, and, therefore, it appears on the face of the

proceedings,

proceedings, that this is a case where the spiritual court had no jurisdiction. 1776.

FULL *versus* HUTCHINS.

The question is, Whether this application, being made *after sentence*, is not too late?

Upon consideration of the principles on which this doctrine is founded, and upon looking into the cases, we are all of opinion that the defendant *in this case* comes *too late* AFTER SENTENCE.

Where matters, which are triable at common law, arise *incidentally* in a cause, and the ecclesiastical court has jurisdiction in the principal point; this court will not grant a prohibition to *stay trial*. For instance, if the construction of an act of parliament comes in question, or a release be pleaded, they shall not be prohibited, unless the court proceed to try contrary to the principles and course of the common law: as if they refuse one witness, &c. And this is expresly laid down by Lord *Hale* in 2 *Lev.* 64. Sir *Wm. Juxom* versus Lord *Byron*.

There is another denomination of cases under which the present case comes, where matters are so properly and essentially triable at common law, that if the party comes for a prohibition *before* sentence, this court will grant it *for the sake of the trial*. But if the party submit to trial, he is afterwards too late.

Where a matter is properly triable at common law, *prohibition* lies *before* sentence. But if a party submit to trial, it is afterwards too late.

The distinction in respect of cases where a prohibition does or does not lie *after sentence*, is this: If it appears on *the face of the libel*, that the ecclesiastical court has *no jurisdiction* of the cause, a prohibition shall go; because there, *interest reipublicæ* that they should not encroach upon the jurisdiction of the temporal courts; and in such case, their sentence is a *nullity*. Therefore, in the case of *Paxton* versus *Knight*, 1 *Burr.* 314. the court, though against their inclination, granted a prohibition; because it appeared *on the face of the libel* that the ecclesiastical court had *no* jurisdiction.

This doctrine and distinction is fully settled and established in a case reported in 10 *Mod.* 12. *Banister* versus *Hopton*. There, upon a motion after sentence for a prohibition to the Spiritual Court, upon a question of prescription, the court held, that tho' it were a matter triable at common law, yet if the party submit to trial, it will be too late for a prohibition after sentence. In the margin of that case is cited 2 *Salk.* 548. which is cited for the true distinction where a prohibition shall or shall not lie after sentence: And there it is said, that if it appear in the libel or proceedings of the cause, that the cognizance of the cause does not belong to the Spiritual Court; a prohibition shall go even after sentence.

Prohibition lies *after sentence*, if the ecclesiastical court has *no cognizance* of the cause; otherwise if there be only a *defect of trial*.

1776. It shall go where they have no cognizance of the cause, not where there is only a defect of trial.

FULL *versus* HUTCHINS.

There is another case fully in point to the same distinction; the name of it is, The churchwardens of *Market Bosworth* versus the rector of *Market Bosworth*, *Hil.* 10 *Wm.* 3. *B. R.* 1 Lord *Raym.* 435. The libel, in that case, was founded upon a *custom* which the defendant denied; and the decree was against the custom: a prohibition was moved for, because custom or no custom, is a matter triable at law; and this appearing on the libel, the court had no jurisdiction; therefore prohibition ought to go, though after sentence. But the whole court held the contrary. And the reason given is this; that the plaintiffs, having grounded their libel on a custom, which would have been well grounded if the custom had not been denied, shall not, after the custom is found against them, prohibit the court from executing their sentence. For the design of the motion for a prohibition is only to excuse the plaintiffs from costs. But say the court, there is no reason why they should not pay them, since it appears they have vexed the defendant without cause: and therefore denied the prohibition.

The same reason holds here, as in that case. The defendant *himself* has alleged the custom, and submitted to trial; therefore, there is no reason now why he should have a prohibition to save himself from the costs.

We are all of opinion, that the cause shewn against the prohibition should be allowed, and the rule discharged.

Per Cur. Rule discharged.

Thursday, May 2d.

VERELST, Esq. and SMITH, *versus* KAFAEL.

Trespass and false imprisonment against *two*; *one* only found *guilty*: Writ of error in the name of *both*; and *amended*, by striking out the name of the defendant who had judgment below.

THE plaintiffs in this case were plaintiffs in error, upon a judgment of *C. B.* in an action of trespass and false imprisonment brought against them in that court *jointly*: but judgment was given against *Verelst* only, *Smith* being found *not guilty*.

Mr. *Buller* had moved to quash the writ of error, because it was brought by them *jointly*: whereas it should have been brought by *Verelst* only, against whom judgment was given.

Mr. *Wallace*, on the part of the plaintiffs, had, on the other hand, moved for leave to amend the writ of error, by striking out the name of *Smith*; upon an affidavit made by the officer,

that

that it was *his* miſtake, and that the inſtructions left with him were to make out a writ of error in the name of *Verelſt only*. 1776.

Verelst ,*et al.* *verſus* Rafael.

Both rules now came on together: Mr. *Wallace* and Mr. *Mansfield* for the plaintiffs inſiſted, that this being a miſtake of the *Filazer* was amendable under the ſtat. 5 *Geo.* 1. *c.* 13. and cited *The Sword blade Company* verſus *Dempſey*. 2 *Str*. 892. as in point.

Mr. *Dunning* and Mr. *Buller*, *contra*, contended, that to ſtrike out the name of one of the parties in this writ of error, would be to alter the caſe entirely, and make it in fact a *new* cauſe. That the only object of the motion for amending was, to get rid of the motion to quaſh the writ, which not being agreeable to the original record, was clearly wrong. Beſides, the ſtatute profeſſes to be made to prevent delay; but if this were allowed, it would encreaſe the delay already uſed to keep the defendant out of his right.

Lord Mansfield.—The ground upon which the application for quaſhing the writ of error in this caſe is founded, is, becauſe it does not agree with the original record. The reaſon why it does not agree with the record, is owing to a blunder, which the officer ſwears was made by his miſtake. What are the words of the act*? It recites, that great delay of juſtice has been occaſioned by *defective* writs of error, which, as the law ſtood at the time of the act, were not amendable: And then it enacts, "That all writs of error, wherein there ſhall be any *variance* "from the original record, *or other defect*, ſhall be amended." Now here is a *defect*, and that defect owing to the miſtake of the officer. In the caſe that has been cited from 2 *Str*. 892. the name of *Mary Edwards* was added by miſtake: Here, the name of *Richard Smith* is ſo; therefore this caſe is exactly like that. The words of the act are general "*other defects*;" and therefore, if there were any doubt, they ought to be extended as far as poſſible, becauſe it is for the furtherance of juſtice.

*Stat. 5 *Geo.* 1. *c.* 13.

Mr. Juſtice *Aſton*, and Mr. Juſtice *Willes* concurred.

Per Cur.—Rule for amending the writ of error, abſolute on payment of coſts; and the rule for quaſhing the writ of error diſcharged.

1776.

Friday, May 3d.

A fraudulent judgment and execution, though void against creditors, is not in itself an act of bankruptcy.

Clavey *et al. versus* Hayley *et al.*

IN trover for a quantity of cloth, upon not guilty pleaded, the jury gave a verdict for the plaintiff, damages 297 *l.* 16 *s.* 10 *d.* and costs, subject to the opinion of the court upon the following case.

That a commission of bankruptcy issued against *William Bloom* on the fourth of *December* 1775.

That the bankrupt being indebted to the defendant *John Cockran* in the sum of 60 *l.* for so much money advanced by him to the said bankrupt; and the said *John Cockran* and the defendant *James Bramble* being *security* for the said bankrupt by a note of hand for the sum of 182 *l.* to the plaintiffs *Clavey* and another, and the sum of 36 *l.* being actually due to the plaintiffs *Clavey* and another, upon a note in which the said defendants *Bramble* and *Cockran* were joined as security for the said bankrupt; he the said bankrupt on the 18th of *November* 1775, executed a bond and warrant of attorney for confessing judgment to the said *Bramble* and *Cockran* in the penal sum of 558 *l.* conditioned for the payment of 279 *l.*

That judgment was entered up on the said warrant of attorney the 23d of *November* 1775, and execution issued the same day marked to levy 282 *l.* 16 *s.*

The question was, Whether this transaction constituted an *act* of *bankruptcy*; and if the court were of opinion with the plaintiffs, then the verdict to stand. But if the court should be of opinion with the defendants, then a nonsuit to be entered.

Mr. *T. Cowper* for the plaintiffs stated the question to be, First, Whether the execution taken out in this case was not a *fraudulent attachment* within the stat. 1 *Jac.* 1. *c.* 15. *sect.* 2.? Secondly, Whether it was not a *fraudulent conveyance* within another part of the same section.

Lord Mansfield.—A fraudulent conveyance that constitutes an act of bankruptcy must be by *deed*.

Mr *Cowper* then confined himself to the first question; and insisted, that there being *no debt* due in this case to the amount of the sum for which the judgment was entered up, and the execution taken out, it was clearly a fraudulently procuring his goods *to be attached* within the words of the stat. 1 *Jac.* 1. *c.* 15. *sect.* 2. The words are, "any person using trade, &c. who wil-

"lingly

" ingly or fraudulently hath or shall procure himself to be ar- 1776.
" rested or his goods to be *attached* or *sequestered*." It will be said the word " *attached*" is used in a technical sense, and has reference only to certain customs in the city of *London*, *Bristol*, and other places. But if such a construction were to prevail, the whole policy of the bankrupt laws would be defeated; and the whole kingdom, except those few places, would be deprived of the benefit of such clause. The words clearly mean, any mode by which a legal restraint is imposed on the goods of a trader, by his wilful and fraudulent procurement. There are no authorities on the subject, except *Woollen* and others assignees v. *Townshend* and others, before Lord *Mansfield* about three years ago, where Lord *Mansfield* held, that procuring the execution to be brought into the bankrupt's house, was, within the meaning of the statute, a fraudulent attachment. Here nothing was due, therefore it was a clear fraud, and consequently amounts to an act of bankruptcy.

CLAVEY *et al.* *versus* HAYLEY *et al.*

Mr. *Davenport*, *contra*, was stopped by Lord *Mansfield*, it being a clear case.

Lord MANSFIELD.—As to the point intended to have been argued, Whether this was not such a fraudulent conveyance as constituted an act of bankruptcy, it might as well be argued, Whether an estate to a man and his heirs is a fee simple or not.

As to the other point, the question is, Whether this is such an act, as constitutes the *crime* of bankruptcy; not whether it is fraudulent, and may be set aside on that account. I do not remember the particulars of the case of *Woollen* v. *Townshend*; but I think, in that case, there was another clear act of bankruptcy. In a subsequent case of *Harman* and others, assignees of *Grey* v. *Spotswood**, I did at first think attachment and sequestration did not include executions. On a second trial, I expressed myself as if attachment and sequestration did include executions. But I was desirous to have it settled; and afterwards, upon argument, the whole court held it not to be an act of bankruptcy.

* Hilary 13 Geo. 3. B. R.

All the bankrupt acts being *in pari materia*, must be taken together. The *stat.* 1 *Jac.* 1. *c.* 15. defines the different acts that constitute an act of bankruptcy, and amongst others is the following, " any one who shall willingly or fraudulently procure him-
" self to be arrested, or his goods, money, or chattels to be *attach-*
" *ed* or *sequestered*." Now the word " *attachment*," being coupled with " arrests and sequestration," shews the legislature meant that sort of *attachment*, by which suits are commenced; and that they plainly

1776.

CLAVEY *et al.* *versus* HAYLEY *et al.*

plainly had in view the customs of *London*, and other towns where that species of process is made use of. A sequestration in *London* is a method of proceeding in an action of debt, where the party cannot be found; in which case, upon the action being entered, the officer goes to the warehouse of the defendant where his goods are, and fixes a padlock on the door; and if the defendant does not put in bail in time, judgment is given against him, and his goods are sold in satisfaction. This statute is followed by *stat.* 21 *Jac.* 1. *c.* 19. which specifies the different securities of creditors. It first enumerates all the common law securities, and then goes on thus: "Or having made *attachments* in *London*, or any other place by virtue of any *custom* there used," and enacts, "that creditors having such securities, unless served and executed, shall not come in for more than a rateable part of their debt, without respect to any penalty or greater sum contained in such judgment, statute, recognizance, attachment, or other security."

Therefore we adhere to the opinion given in *Harman* v. *Spotswood*, that a fraudulent execution, though it will not stand in the way of creditors, being void as against them, yet does not of itself constitute an act of bankruptcy.

Aston and *Willes* Justices concurred.

Per Cur. Nonsuit to be entered.

Same day.

WILKINSON *qui tam*, *versus* ALLOT.

The *want* of a *parsonage house*, is no excuse for the incumbent's residing *out* of the parish.

IN debt upon the statute 21 *H.* 8. *c.* 13. for non-residence, upon *nil debet* pleaded, a verdict was found for the plaintiff, subject to the opinion of the court upon the following case.

That the defendant, *Bryan Allot*, clerk, was presented, instituted, and inducted to the rectory of *Burnham St. Mary's*, otherwise *Burnham Westgate* and *Ulple*, in the county of *Norfolk*, in the year 1766, of the value of above 300 *l. per annum:* That he had first a lodging, and afterwards a ready-furnished house in the said parish, until *Michaelmas* now last past, which he then quitted. That from time immemorial, there *was not*, nor *is there any parsonage house* upon the living That under these circumstances, the defendant *absented himself from all residence* on the said living, and *from every parochial duty*, from the 28th day of *April* 1775, to the 28th day of *December* now last past, (being eight months) *without any other legal excuse;* and did not, during

the said eight months, reside in or near the said living: but during all that time appointed a proper and *sufficient curate, or curates*, for all parochial duty of the said defendant's church or churches belonging to the said living, which curate or curates were resident *upon* the said living. 1776. Wilkinson *versus* Allott.

The question reserved was, "Whether, under all these circumstances, the said defendant shall be deemed guilty of wilful absence, and non residence, and subject to the penalties of the statute 21 *H.* 8. *c.* 13.?"

Mr. *King* for the plaintiff was beginning to argue, but Lord *Mansfield* called upon the counsel for the defendant to go on.

Mr. *Partridge*, for the defendant, recited the preamble of the *stat.* 21 *H.* 8. *c.* 13. and also the 26th section, from whence he argued, it was apparent that the objects of the statute were of three kinds. 1*st*, That the cure should be duly and regularly served. 2*dly*, That hospitality should be maintained. 3*dly*, That the parsonage house should be upholden and preserved in a condition fit for the incumbent to live in. That these requisites had been complied with by the defendant, as far as lay in his power. As to the two first, it was expressly stated in the case, that there was a sufficient curate for all the parochial duty, &c. actually *resident* upon the living. In respect of the last, it was impossible in this case for the defendant to comply with it; because, from time immemorial, there never had been any parsonage house in the parish. It would be absurd, therefore, to talk of residence for the purpose of repairs, where there was no house to repair. The cases upon this statute are very few. 6 *Co.* 21. *b. Goodale* v. *Butler*. *Cro. El.* 590. and *Goldesbor*. 169. *S. C.* The words in 6 *Co.* are express to the point. "It was agreed, that lawful imprisonment, without covin, is a good excuse for *non-residency*; so, if *there be not any parsonage house there*." These cases are excepted out of the act by construction of law. In *Law* versus *Ibbetson*, *East.* 11 *Geo* 3. *R. B.* Lord *Mansfield* said, "this case is extremely clear; because the defendant has absented himself from his parsonage house without any excuse, and therefore is certainly within the meaning of the act. It has been determined that if a parson lives in his parish, and lets his parsonage house, reserving a chamber to himself, he is yet subject to the penalty*: so, if he keeps his house in repair, and servants constantly live in it†, he himself residing elsewhere; for the residence must be in the *identical house*: therefore, residence in the parish, even in a house of his own, is no excuse. But if there is no parsonage house, he is excused al-

"together

* *Cro. El.* 590.

† 2 *Brownlow* 54.

1776.

WILKINSON *versus* ALLOTT.

"together*; for upon a penal act, he cannot be prosecuted for not "residing when there is no house to reside in." Here, it is expressly found, that there *never has been any parsonage house*; therefore, the defendant is excused: and he prayed judgment accordingly.

Lord MANSFIELD.—The statute of non-residence is a beneficial law; and though a penal one, has received a strict construction against such as have offended.

A clergyman with cure of souls is bound, not only by the canon law, but in conscience, to attend his duty in person if he can. By experience it was found, that neither conscience nor canon law were sufficient to bind the clergy to a due observance of their parochial duty; but they left it to be done by poor curates hired at small salaries. It would be a strange argument to say, that persons of that description could possibly maintain the hospitality which the statute had in view, and which ought to be kept up.

The *stat.* 21 *Hen.* 8. *c.* 13. was made to remedy this grievance, and the words are general; "that every spiritual person, *&c.* shall "*reside in, at*, and *upon* his *benefice*:" it does not say in, at, and upon his *parsonage house*. The word *benefice* was indeed formerly used, to denote certain portions of land, given by lords to their followers for their maintenance; but now it is a general term for any ecclesiastical living or preferment. In this case, the *benefice* is a *parsonage* or vicarage, and the *general* words used by the act might be satisfied by his residing *any where* upon the living. However, authorities as far back as the time of *Elizabeth* say, that that construction does not answer the end; but it must be a *residence in the parsonage house*. It is a remedial and beneficial law both for the parish and the successor; and cases have been determined, where, though the parson lived within twenty yards of the parsonage house, and though he had a servant who slept in it †, yet it was holden not to be a legal and sufficient residence.

It is true, the law says, that in all restrictions imposed, impossibility is an excuse; but then it must be performed *cy pres*. If there has been no parsonage house from time immemorial, it is most certain that the parson cannot live in it. What then? The next thing to be done is, to come as near to it as he can: He must live *some where in the parish*. His conscience obliges him to do so. The canon law requires it, and this statute enforces the obligation under a penalty. It is said, that in *Law* versus *Ibbetson*, I did say, "that if there was no parsonage house, the parson "might reside where he pleased ‡;" but it is clear that must mean

* *Vide* 5 *Burr.* 2722.

† 2 *Brownlow* 54.

‡ *Vide* 5 *Burr.* 2722, where Lord *Mansfield* says, "If there be *no house*, then indeed he may reside *where he will, provided* it be *within the parish*."

some-

somewhere in the parish. Any other construction would be a shameful evasion of the statute. Here, there is no parsonage house; but the want of a parsonage house is no excuse for residing out of the parish entirely; and, therefore, there must be judgment for the plaintiff.

1776.

WILKINSON *versus* ALLOTT.

Aston and *Willes* Justices concurred.

Judgment for the plaintiff.

Monday, May 6th.

CADOGAN *et al' versus* KENNETT Esq; *et al'*.

One being *indebted*, by settlement before marriage, in consideration of the marriage, and of 10,000*l.* his wife's portion, which was supposed to be more than the amount of his debts at that time; conveys all his real estate, and likewise *household goods* (his real estate, alone not being thought an adequate settlement), *in trust* for himself for life, remainder to his *wife* for *life*, remainder to his first and other sons in strict settlement. The lady being a ward of Chancery, the settlement was approved of by the Master, and the goods enumerated in a schedule.—*A.* after the marriage, continued in possession of the goods; after which a *creditor at the time of the settlement*, having obtained judgment, took them in execution. Held, the settlement was good against creditors, and the trustees entitled to the possession of the goods. But if *A.* had let the house ready furnished, the defendant *K.* during *A.*'s life, would have been entitled to an apportionment of the rent. And there having been a *sale* of *part* of the goods in this case, it was by consent agreed, that the value should be vested in the funds, on the trusts of the settlement; and the interest during *A.*'s life paid the defendant *K.* The rest of the goods were ordered to be specifically delivered.

UPON shewing cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows:

This was an action of trover brought by the plaintiffs, who are the trustees under the marriage settlement of Lord *Montfort*, against the defendant Mr. *Kennett*, who is a judgment creditor of Lord *Montfort*'s, and the other defendants, who are sheriff's officers, to recover certain goods taken by them in execution under a *fi fa.*—At the trial the plaintiffs proved Lord *Montfort*'s marriage settlement, by which it appeared that the goods in question, which were the household goods belonging to Lord *Montfort*, at his lordship's house in town, and which were very minutely particularised in a schedule annexed to the settlement, were all conveyed to the plaintiffs, as *trustees*, for the use of Lord *Montfort* for life, remainder to Lady *Montfort* for her life, remainder to the first and other sons of the marriage in strict settlement.

One of the witnesses proved, that at the time of the settlement being made, it was known Lord *Montfort* was in debt:—but he thought the fortune of the lady he was to marry, which amounted to 10,000 *l.* was amply sufficient to pay all the debts he owed at that time, and had no idea of disappointing any creditor. That Mr. *Kennett* was a *creditor* of Lord *Montfort at the time of the settlement.*—That Lady *Montfort* was a ward of the *Court* of *Chancery*; and the reason for including the household goods in the settlement was, because it was thought Lord *Montfort*'s real estate was not of itself sufficient to make a proper and adequate settlement.—It appeared also that the settlement was referred to a Master in Chancery, who approved of the settlement, and the inserting the household goods for the reason above-mentioned.

At

1776. At the trial, I inclined to think, that the settlement being made under a treaty with the *Court* of *Chancery*, and approved of by the Master, was a *bonâ fide* transaction, and that the *possession* of Lord *Montfort* was *not fraudulent*, because it was in *pursuance*, and in *execution*, of the *trust*.

CADOGAN *versus* KENNETT.

The jury found a verdict for the plaintiff, damages 1 *s.* and if the court should be of opinion with the plaintiffs, then the goods were to be delivered specifically.

Mr. *Wallace* and Mr. *Davenport*, in support of the new trial, insisted that the settlement itself was a fraud, and the possession by Lord *Montfort* the strongest evidence possible of an intention to deceive creditors. That the fact of Lord *Montfort*'s debts being made known to the trustees, was no ground for excepting this case out of the general rule: On the contrary, they ought in that case to have seen that Lord *Montfort* did not meddle with the fortune brought him by Lady *Montfort*; but should have had that sum invested in them for the purpose of discharging the debts due at that time. That this was the common case of a debtor making a beneficial trust for himself.—That Lord *Montfort* might have disposed of the goods during his lifetime; and consequently, as against him at least, they were not protected from an execution at the suit of a fair creditor. They compared this to the case of a trader selling his goods, continuing in possession, and afterwards becoming bankrupt; and cited 3 *Co.* 80. *Twine*'s case.

Mr. *Dunning contra*, did not dispute the doctrine laid down in *Twine's* case, and admitted, that visible possession was a strong circumstance, in all cases, of fraud. But he insisted the possession in this case was not for any purpose of fraud but consistent with and agreeable to the trust. He agreed that Lord *Montfort*'s interest was not protected, but contended the interest of Lady *Montfort* was protected: That the transaction was manifestly *bonâ fide*, and without the most distant intention to defraud, and therefore the plaintiffs were entitled to recover.

Lord MANSFIELD.—The question in this case is, whether the plaintiffs, who are trustees under the marriage settlement of Lord *Montfort*, by which the household goods in question are settled as heir looms with the house in strict settlement, and specifically enumerated in a schedule annexed to the settlement, so as to avoid any fraud by the addition or purchase of new; whether, the trustees are entitled to the possession of these goods against the defendant Mr. *Kennett*.

The defendant has taken the goods in execution; and it is not disputed that he is a fair creditor. But the plaintiffs bring this

action

action as trustees under the marriage settlement, and the question is, Whether they are, against the defendant, entitled to the possession of these goods for the purposes of the trust.—I have thought much of this case since the trial, and in every light in which I have considered it, I have not been able to raise a doubt. 1776.

CADOGAN *versus* KENNETT.

The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 *El. c.* 5. and 27 *El. c.* 4. The former of these statutes relates to *creditors* only; the latter to *purchasers*. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.

The *stat.* 13 *El. c.* 5. which relates to frauds against creditors, directs "that no act whatever done to defraud a creditor "or creditors shall be of any effect against such creditor or "creditors." But then such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bonâ fide*, and where there is no imagination of fraud. And so is the common law. But if the transaction be not *bonâ fide*, the circumstance of its being done for a *valuable consideration*, will not *alone* take it out of the statute. I have known several cases where persons have given a fair and *full price* for goods, and where the *possession* was *actually changed*; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void.

One case was, where there had been a decree in the *Court* of *Chancery*, and a sequestration. A person with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them. The court said, the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void.—So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods, it is void: because, the *purpose* is *iniquitous*. It is assisting one man to cheat another, which the law will never allow.—There are many things which are considered as circumstances of fraud. The statute says not a word about *possession*. But the law says, if after a sale of goods, the vendee continue in possession, and appear as the *visible* owner, it is evidence of fraud; because goods pass by delivery*: But it is not so in the case of a lease, for that does not pass by delivery.

The *stat.* 27 *El. c.* 4. does not go to *voluntary* conveyances *merely* as being *voluntary*, but to such as are *fraudulent* *. A fair voluntary conveyance may be good against creditors, notwithstanding

* *Vide infra*, 705. Doe *v.* Routledge.

1776.

CADOGAN *versus* KENNETT.

standing its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, Whether the act done is a *bonâ fide* transaction, or whether it is a trick and contrivance to defeat creditors. If there be a conveyance to a trustee for the benefit of the debtor, it is fraudulent. The question then is, Whether this settlement is of that sort. It is a settlement which is very common in great families. In *wills* of great estates, nothing is so frequent as devises of part of the *personal estate* to go as *heir looms* *: For in-

* At the last sittings in *Middlesex* in *Trinity* Term 1779, the following case arose upon the will of the late Lord *Foley*, and was tried before Lord *Mansfield* at *Westminster*. The name of it was *Foley* and another *against Burnell* and another, sheriffs of *Middlesex*. It was an action of *trover* brought by the plaintiffs, who were trustees and executors under the late Lord *Foley*'s will, against the defendants, to recover a certain quantity of *wine*, *linen*, and *china* taken by the defendants in execution, at the suit of a creditor of the present Lord *Foley*, the late Lord *Foley*'s eldest son. Upon not guilty pleaded, the case at the trial appeared to be as follows: *Thomas* Lord *Foley* by will dated 19th *June* 1777, and by a codicil dated the 17th of *September* following, devised all his real estates in several counties to the plaintiffs for a term of 99 years, and subject thereto, to his eldest son *Thomas Foley* for life, with remainder to his first and other sons in strict settlement. Remainder to his second son *Edward Foley* for life, with remainder to his first and other sons in strict settlement. Remainder to *Andrew Foley* one of the plaintiffs, with remainder to his first and other sons in like manner; with remainders over. The trusts of the term were to receive the rents and profits, and thereout, according to their will and pleasure, to allow the two sons *Thomas* and *Edward*, yearly and every year, any sum or sums of money not exceeding in the whole the sum of 6000*l*. in any one year, till such time as the debts of his said two sons should be discharged; but so as his said two sons should have *no estate* or *interest* in the rents and profits of the said premises. And then the testator, after providing for the discharge of his said sons' debts, devised as follows: "Also I give and bequeath all the standards, fixtures, *household goods*, implements, and "*household furniture*, pictures, tapestry, gold and silver plate, *china*, porcelaine, glass, "statues, busts, libraries and books, which shall be in the said several capital messuages, called *Stoke*, *Great Witley*, and *Foley* House to be held and enjoyed by the "several persons who from time to time shall successively and respectively be entitled "to the use and possession of the same houses respectively, as and in the nature of "*heir looms*, to be annexed to, and go along with, such houses respectively for ever."

At the death of the testator there was a considerable quantity of *wine*, *linen*, and *china* in *Foley* House.

The trustees under the will of Lord *Foley*, permitted his eldest son Lord *Foley* and his family to live in *Foley* House rent free; sent him the key of the *wine*, and Lady *Foley* the key of the *linen* and *china*: which they accordingly used as they liked, and continued in possession of, till they were taken in execution by the defendants in this action. Upon the execution's coming into the house, the plaintiffs gave notice to the sheriff that part of the *wine*, *linen*, and *china*, specifying the particulars of each, belonged to them as the trustees and executors under the late Lord *Foley*'s will, and demanded them to be delivered up; which was refused.

The jury at the trial found a verdict for the plaintiffs, to the amount of the wine, linen, and china, taken in execution; and the defendants acquiesced without moving for a new trial.

stance,

stance, the devise of the Duke of *Bridgewater*'s library.—The old Duke of *Newcastle*'s plate. So in marriage settlements, it is very common for libraries and plate to be thus settled, and for chattels and leases to go along with the land. If the husband grows extravagant, there never was an idea that these could afterwards be overturned. If this court were to determine they should, the parties would resort to Chancery.—We come then to the circumstances of the present case, which are very strong. There is not a suggestion of any intention to defraud, or the most distant view of disappointing any creditor. The very objection of the marriage settlement was, that the lady's fortune might be applied to the discharge of all Lord *Montfort*'s debts: the amount of this fortune was 10,000 *l.* and was thought fully sufficient for that purpose. Besides this, it is a settlement approved by a Master in Chancery. Most clearly the Master in Chancery and the Great Seal could have no fraudulent view. But it appears further, that the reason why the goods were inserted was, because the settlement of the real estate alone was thought inadequate without them. Clearly, therefore, it was no contrivance to defeat creditors, but meant as a provision for the lady if she survived, and heir looms for the eldest son.

1776.

CADOGAN *versus* KENNETT.

An argument, however, is drawn from the *possession*, as a strong circumstance of fraud: but it does not hold in this case. It is a *part* of the *trust* that the goods shall continue in the house; and for a very obvious reason: because, the furniture of one house will not suit another; and it was the business of the trustees to see the goods were not removed.

If Lord *Montfort* had let his house with the furniture, reserving one rent for the house, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the rent; but they have no right to take the goods themselves: The possession of them belongs to the trustees, and the absolute property of them is now vested in the eldest son.

I expected an authority; but though such settlements are frequent, no case has been cited to shew they are fraudulent. How common are settlements of chattels, and money in the stocks: can there be a doubt but they are good? Yet the creditors would be entitled to the dividends during the interest of the debtor. Here, there was clearly no intention to defraud, and there is a good consideration. Therefore, I am of opinion it could not be left to the jury to find the settlement fraudulent, merely because

1776.

CADOGAN *versus* KENNETT.

there were creditors. The goods must now be kept in the house for the benefit of the son.

ASTON Justice. I am of the same opinion.

WILLES Justice.—I am of the same opinion.

Per Cur. Rule for a new trial discharged.

Lord MANSFIELD.—The goods and furniture that have not been sold are to be delivered specifically. As to those which have been sold, let any indifferent person put a value upon them; the value to be paid by Mr. *Kennett*, and the amount vested in government securities at 3 *l. per cent.* upon the trusts of the settlement; the interest to be paid to Alderman *Kennett* during Lord *Montfort*'s life. And as to all the goods which are not included in the schedule, they belong to the defendant under the execution.

N. B. This was consented to at *Nisi Prius*, in case the court should be with the plaintiffs upon the general question.

Friday, May 17th.

MARTYN *versus* HIND.

If a rector give *A B.* a title to the bishop and thereby appoint him curate of his church, promising to allow him a salary and to continue him in the office of curate, *till otherwise provided of some ecclesiastical preferment*, unless lawfully removed for any fault, he cannot afterwards remove him without cause: and if the salary be in arrear, *A. B.* may maintain *assumpsit* upon the title.—A *readership* is not an *ecclesiastical preferment* within the meaning of such title.

UPON shewing cause why a new trial should not be granted, the case as it appeared by the report was to this effect. The action was an action brought by the plaintiff against the defendant, who was the rector of St. *Ann's Westminster*, to recover a sum of money due from him to the plaintiff, for officiating as his curate. The declaration consisted of several counts. The third count, on which the verdict was taken, stated as follows: "And whereas also the said *Richard* at the time of the making the "promise and undertaking hereinafter next mentioned, was, and "from thence always hitherto hath been, and still is, rector of the "said parish church of St. *Ann Westminster* in the said county, to "wit, at *Westminster* in the said county, and the said *Richard* be-"ing such rector as aforesaid, by a certain instrument in writing, "subscribed by and with the proper hand of the said *Richard*, "bearing date the 13th of *February* 1769, at *Westminster* afore-"said, he the said *Richard* undertook, and to the said *Thomas* then "and there faithfully *promised* to *retain*, and *continue* the said *Tho-*"*mas* to *officiate in the said church, until he should be otherwise pro-*"*vided with some ecclesiastical preferment*, unless, by *fault* by him "committed, he the said *Thomas* should be *lawfully removed* from "the same; and to pay him the sum of fifty guineas a year dur-"ing that time. And the said *Thomas* in fact says, that although "he is not yet provided with any other ecclesiastical preferment, "nor has been lawfully removed from the same church, or

"officiating therein, yet the said *Richard*, not regarding, &c.— Plea *non assumpsit*. Verdict for the plaintiff. At the trial, the plaintiff, in order to prove the defendant's undertaking, gave in evidence the following certificate directed to the bishop of *London* on the plaintiff's being ordained priest.

"These are to certify to your Lordship, that I, *Richard Hind*, "rector of St. *Ann's Westminster*, in the county of *Middlesex*, "and your Lordship's diocese of *London*, do hereby nominate "and appoint the Reverend *Thomas Martyn*, to perform the of-"fice of curate in my church of St. *Ann* aforesaid; and do pro-"mise to allow him a yearly sum of fifty guineas for his main-"tenance in the same, and to continue him to officiate in my said "church, *until he shall be otherwise provided of some ecclesiastical* "*preferment*; unless, by any fault by him committed, he shall "be lawfully removed from the same. And I hereby solemnly "declare, that I do *not fraudulently* give this certificate to *entitle* "the said *Thomas Martyn to receive holy orders*, but with a real "intention to employ him in my said church according to what "is before expressed. Witness my hand this 13th day of *Febru-*"*ary* 1769. *R. Hind*."

On the part of the defendant, two several notices were produced from him to the plaintiff; one, dated 26th of *November* 1774; the other, dated *June* 16th 1775, directing him to quit the curacy: The last of which was in these words. "Dr. *Hind* here-"by gives notice to Mr. *Martyn* to quit the curacy of this pa-"rish on the 26th of next month, agreeably to a former notice "given to him on the 26th of last *November*." They also produced an appointment of the plaintiff to the readership of the parish in *June* 1769, of the value of 30 *l. per annum*. In respect of this office, it appeared, by the entries in the parish books, that from the year 1718, a reader was supported by the will of a Mr. *Bishop* out of the profits of some leasehold premises, until the year 1734: from which time the reader was supported by order of the *vestry*, and *at their will*, out of monies allowed the churchwardens in their accounts. That the reader was appointed by the vestry; but no traces could be found of any appointment prior to the year 1718. That the duty of the plaintiff, as reader, was to read prayers on such days as the parson of the parish was not used to perform divine service.

Mr. *Dunning* and Mr. *Buller*, who shewed cause, insisted, that a *readership* was *no ecclesiastical preferment*. That, according to Dr. *Burn* in his third volume of ecclesiastical law, the office began in the third century; and was one of the five inferior orders

1776. in the *Romish* church. That in the *Greek* church, they were appointed by ordination: But in the *Latin* church, ordination was not neceffary. That in *Wales*, in many parts of *England*, and in colleges, perfons officiate as readers who are not even in orders. That in this parifh there was no reader till 1718; and though at that time a fund was appointed fufficient to fupport it during a certain period, it was now an office determinable at the will of the parifhioners; and therefore, could not in any light be confidered as preferment within the meaning of the title. If fo, the *remaining objection* was, that the title itfelf was only an engagement to indemnify the bifhop, and no promife or undertaking to provide for the plaintiff. As to that, they infifted, that by the terms of the inftrument it was clearly a certificate of the plaintiff's appointment to the office of curate in the defendant's church; a promife to allow him fifty guineas *per annum*; and an exprefs undertaking to continue him in the office till otherwife provided for. Added to which, it contained a folemn declaration that the defendant did not mean it as a mere title to the plaintiff to enable him to obtain prieft's orders; but to give him a *permanent* intereft, determinable only in two events, neither of which had taken place; namely, his being provided with fome ecclefiaftical preferment, or being lawfully removed for fome fault.—That if it was *not* meant as a *title*, it could be no indemnity to the bifhop, and therefore, there was no ground for fuch objection.—To fhew the confideration was a good and fufficient ground for the promife alleged, they relied on *Dutton* verfus *Poole*, 1 *Ventr.* 318. 332.

MARTYN *verfus* HIND.

Mr. *Wallace*, Mr. *Mansfield*, and Mr. *Davenport*, *contra*, for the defendant, contended: 1ft. That this certificate was *no promife* or undertaking on the part of the defendant, to employ the plaintiff as his curate; but intended merely as an *indemnity* to the bifhop againft the provifions of the 33d canon: by which, every bifhop, who ordains a parfon without a title, is obliged to maintain fuch perfon at his own expence. That this was the object of both parties at the time, was apparent from the certificate being fent to the bifhop, kept in his cuftody, and produced at the trial by his fecretary. By the terms of it, the contract was with the *bifhop* only; and if *he* had brought an action, fuggefting a damage fuftained by the plaintiff's being without preferment, the action would have lain. Befides, in all contracts, the obligation ought to be *reciprocal*. But here the plaintiff might have quitted the curacy at his pleafure. 2dly, They objected that the plaintiff had no *licence* from the bifhop to officiate as curate; and fuppofing he had, ftill he was removable at pleafure: Therefore,

 could

could not maintain this action. To this point, were cited, 2 *Salk*, 506. *Bunbury* 273. 2 *Vez*. 427. *Noy*. 15. *Bott* v. Sir *Edward Brabalon*. 3dly. That the appointment of the plaintiff to the readership of St. *Ann*'s, at the salary of 30 *l*. *per annum*, was an ecclesiastical preferment. That the duty of the reader in such a case was not such as a layman could perform, but required the whole of the divine service to be read, and that he should assist in the administration of the sacrament: And cited 3 *Burn*. *Ec*. *Law*. tit. *Ordination*, p. 24.

1776.

MARTYN *versus* HIND.

Lord *Mansfield* upon the argument said; this is a general question, and quite new. It does not turn upon a distinction between *perpetual* curates and general or temporary curates. There is a distinction between curates licensed, and curates not licensed. If not licensed, they are removable at pleasure. But if licensed, they are only removable *sub modo*; for instance, by the consent of the bishop; or where the rector does the duty himself. But the great point in this case is, what is the import of the obligation which a person comes under, by giving such a title to the bishop: Whether it is a *jus quæsitum* in the curate, so as he can oblige the parson to make good the salary to him, according to the terms of the certificate. As to the plaintiff's not having a license in this case, it is true the bishop has not licensed him in *form*, but he has *substantially* and in effect licensed him, by receiving his title. It is a matter of importance; and, therefore, we will think of it.

Cur. advisare vult.

Afterwards, on this day, Lord *Mansfield* delivered the opinion of the court as follows:

This is an action brought by the plaintiff, as curate of the defendant, who is rector of the parish of St. *Ann's Westminster*, to recover a sum of money due to him for his salary or stipend. His Lordship stated the third count upon which the verdict was taken;—the title for the plaintiff's having priest's orders, and the two notices to quit *: and then proceeded thus:

* *Vide supra*, 438.

It has been argued, that this was a reasonable notice to the plaintiff, supposing Dr. *Hind* could remove him at his pleasure. The defendant employed another curate. It was admitted that the plaintiff was always ready to perform the duty of curate; and the defendant engaged to admit this, to avoid any contest between him and the new curate.

At the trial, a defence was attempted, *viz*; that the plaintiff was lawfully removed for faults by him committed, and imputations were thrown upon his life and manners; and evidence of-

1776. MARTYN *versus* HIND.

fered to prove the irregularity of his conduct; but I would not suffer them to go into any criminal charge against the plaintiff: Because I thought, in the first place, that the defendant ought in that case to have complained to the bishop, and obtained his sentence, or judgment, or direction in a *formal*, or at least in a *summary* way: And secondly, if the defendant could, without applying to the bishop, have removed the plaintiff for a cause, subject to the opinion of this or any other court, as to the sufficiency of such cause of removal; he ought to have given the plaintiff notice of it. But in the notices given to the plaintiff to quit, he specifies no fault or objection, but grounds them on his mere will and pleasure. It did not appear by the evidence, that he had ever hinted to the plaintiff, what was now by *surprise* offered to be laid to his charge; so that he could not possibly be prepared to make any answer to the charge.—This objection of mine to the entering into proof of such a charge, has not been complained of, nor mentioned by counsel; nor has any motion been made for a new trial, in order to let the defendant into that evidence. But I think fit to take notice of it, because I have heard of it; and wish the grounds upon which this cause is determined may not be misapprehended. Upon full consideration we are of opinion, that it was right not to suffer the defendant, under these circumstances, to justify the removal of the plaintiff, by an accusation produced for the first time at the trial of the cause. And, therefore I desire it may be understood, that whatever the decision of the present cause may be, we do not proceed upon any ground that such a curate as this may not be removed by the bishop; or even that if a misbehaviour is precisely notified to him, as the cause of his removal, the rector may not justify himself by that cause, if it be true in fact and sufficient in law. That ground is still open and may be insisted upon in case of another action.

After over-ruling this attempt, the cause being general, and new in *Westminster* Hall, I desired to save it for the opinion of this court; and the jury gave a verdict for the plaintiff, subject to that opinion.

Three objections are made to the plaintiff's recovering in this action. First that the *promise* is a promise to, and a *contract* or engagement with, the *bishop*, to *indemnify* him from maintaining the plaintiff; but is *no promise*, no contract, no engagement with the *plaintiff*, and, therefore, gives him no right to sue.—The *second* objection is, that the plaintiff is not *licensed* by the bishop.—The *third* objection is, that the plaintiff, on the

the 26th of *June* 1769, was appointed *reader* of *extra* prayers in this parish church, at the hours of 11 and 4 o'clock, at a salary of 30*l.* a year, to be paid by the churchwardens, and charged in their accounts. This, the defendant says, is an *ecclesiastical preferment*, and consequently, that the defendant, from that day, was not obliged to continue the plaintiff as his curate. 1776.

MARTYN *versus* HIND.

As to the first, Whether the plaintiff can maintain any action, it will be necessary to examine and consider the *nature* of the *title*, and the nature of the *certificate* to the bishop. In the canons of 1603, by the 33d canon, there is this provision—"It has been long since provided by many decrees of the ancient "fathers, that none shall be admitted either deacon or priest, "who had not first some place to exercise his function in: "According to which examples we do ordain, that henceforth "no person shall be admitted into sacred orders, except he shall "at that time exhibit to the bishop, of whom he desireth impo-"sition of hands, a presentation of himself to some *ecclesiastical* "*preferment*, then void *in that diocese*: Or shall bring to the "said bishop a true and undoubted *certificate*, that either he is "*provided of some church within the said diocese*, where he may "attend the cure of souls; or of some minister's place vacant in "the cathedral church of that diocese, or in some other collegiate "church therein also situate, where he may execute his ministry "*&c.* And if any bishop shall admit any person into the mi-"nistry that hath none of these titles, as is aforesaid, then he "shall keep and maintain him with all things necessary, till he "do prefer him to some ecclesiastical living."

This shews, that, by the general canon law, it is not barely necessary, that a man, to be ordained, should have a maintenance; but that he should likewise have, *within the diocese*, some church where he may exercise his ministerial function: For *that* is the ground upon which the bishop is entitled to ordain; and if the cure is in another diocese, the bishop offends by ordaining him without special letters dimissory for that purpose. *Vide Gibson's* Commentary upon this title, page 162-3.

It must therefore be a *church*, or place *within the diocese*, where he may exercise his function; and this provision I take to be older than the penalty upon the bishop; for that began in the year 1200.

What then is the bishop to be informed of before he ordains? That the person to be ordained has, *in the diocese*, some *benefice*,

 church,

1776. MARTYN *versus* HIND.

church, or *curacy*, as in the canon abovementioned. When the bishop is certified of this, he is liable to no penalty; and if, after such certificate, the clergyman, who is ordained, quit the curacy, or be unjustly removed, the bishop is not in fault. He is only liable, in case he ordains *without* such certificate.

In the next place, what is the operation of the certificate? It is not a contract with the bishop to indemnify him; but a certificate and assurance to the bishop of a matter of fact: That such a one has appointed the person named in the certificate, to be curate of his parish; that he undertakes to pay him a certain salary, and that he will continue him in the curacy till he is otherwise provided. It is difficult to raise a question, when the mere state of the certificate itself makes the case plainer than any argument can do. It is no indemnity to the bishop, or any thing like it. It is no promise to, or contract with him, but merely an information of a matter of fact.

As to the case of *Dutton* versus *Poole*, 1 *Vent.* 318. 332. it is matter of surprise, how a doubt could have arisen in that case. It was a promise to the father by a person in remainder, that if he would leave so much wood standing, he would pay his daughter 1000 *l.* the value of the wood which the father had intended to cut down. The daughter, upon the father's death, brought an action for the 1000 *l.* and the court held she was entitled to bring the action. And upon error, the judgment was affirmed. But this case is infinitely stronger; for it is in no possible respect a promise, but merely a matter of information to the bishop: The contract is with the curate. Therefore, there is no shadow of objection to the plaintiff's maintaining this action.

The 2d objection is, that the plaintiff is *not licensed* by the bishop. Within the true intent and meaning of the canon law, he *is* licensed by the bishop; for he has ordained him on *this title.* If so, the bishop has solemnly approved of his being the curate of this church. It is the very foundation and title of the ordination; and therefore he is licensed to all intents and purposes. Whether this be a compliance with the letter of some penal statutes which require a specific form of licence, may be a critical question. But the objection does not lie in the mouth of the defendant, as an excuse to him for not performing his contract: He, as well as the plaintiff, have understood for years, that is, ever since the year 1769, that his ordination upon this title was a sufficient licence; or if they did not so understand it, the defendant

fendant has waved the objection. In his notice to quit, he does not object the want of a licence: In case he had, the plaintiff might have immediately got a licence, had he thought that necessary. If, after reasonable notice, he does not procure every qualification necessary to enable him to do the duty, the defendant would be excused from paying him the salary; for the plaintiff's service as curate, is not only the *consideration*, but the *condition* of the salary. 1776. MARTYN *versus* HINN.

The 3d objection is, that the plaintiff is in fact, and agreeably to the terms of the contract, otherwise provided with an ecclesiastical preferment.

Of this objection we have thought a great deal. The action does not appear in a very favourable light. But independent of that, the success of the plaintiff in this case may involve both parties in more litigation, little to the advantage of either. Besides this, one would wish to avoid animosities in parishes, which such disputes too frequently create. But, upon the fullest consideration, we find it impossible to say, that *this readership* is an *ecclesiastical preferment*. For, what is the office of the plaintiff, when the terms of it come to be understood?

The term *reader*, has confounded us; but it has nothing to do with the cause. The plaintiff is not a reader in any sense of the law. This is nothing more than a parish employing a clergyman in priest's orders to read prayers, and they call him a reader.

The term *reader*, is made use of by the canon law; but a reader known to the canon law is always put in *opposition* to a *clergyman*. It is one of the five orders of the *Romish* church inferior to the deacon; they are always considered *laymen* in the idea of the canon law, and are expresfsly put in opposition to clergymen. I have been informed, that in the *Welch* dioceses, where there is no endowment worth the while of a clergyman to accept (and in *Chester* there are many such) many persons officiate as readers in opposition to clergymen. At the reformation there were several objections started with respect to readers; every one of which consider them not as clergymen. Is an employment then, an ecclesiastical preferment, where a private man may be employed? *Watson* upon the canon law states, that there are but two ways of being provided by the church, without being an incumbent of it; *viz.* "being a curate, or a lecturer." They are both taken notice of by law. They must be licensed; they must subscribe to the articles, and make the declaration. But a priest employed by

1776.

MARTYN *versus* HINDE.

by any body to read prayers, wants no authority: The very ordination gives him the authority: He wants no licence, he signs no articles: The bishop cannot inhibit him, and the office is temporal.

I desired the institution of the parish might be looked into: It is probable there were ministers employed to read prayers in this parish before the year 1706; because it was in proof, that a Mr. *Brown* left a legacy on a temporary fund to be divided between the reader and the lecturer. But there is no entry of this till 1718; and it varied in respect of the duty to be done: For in some cases the reader was required to assist the clerk. But in the appointment of the plaintiff nothing is required except as before stated. In 1734, the temporary fund ceased; then there is an entry, that information has been given of its so ceasing; upon which the parish make an order, that 30*l*, *per annum* should be paid to the reader out of what they call the *commission* money. Afterwards a subsequent order is made, that the church-wardens were to pay it. What stability is there in this? No one can read prayers in a church without the consent of the rector. What obligation is there, if the parish should think fit not to have a reader, to bind or compel them to have one any longer? The appointment and salary are only during pleasure; and the office such as requires no licence or authority. Therefore, we think it impossible to consider this as an ecclesiastical preferment. The consequence is, that the rule for a new trial must be discharged.

Per Cur. Rule discharged.

Same day.

FOX *et al.* Assignees *versus* HANBURY *et al.*

If one of two partners become bankrupt, the solvent partner may, if for a valuable consideration and *without fraud*, dispose of the *partnership* effects; and if *he* afterwards fail, the assignees, under a *joint* commission against *both*, cannot maintain *trover* against the *bonâ fide* vendee of such partnership effects.

UPON a rule to shew cause why the arbitrator named in an order of *nisi prius*, made in this case, should not be directed to settle, in his award, the account of the consignments of tobacco to the defendants, proved on the trial, from the time of the bankruptcy of *Thomas How Ridgate*; the case, as reported and stated by Lord *Mansfield*, appeared to be as follows:

This was an action of trover brought by the plaintiffs, as assignees under a joint commission of bankrupt, taken out against *John Barnes* and *Thomas How Ridgate* bankrupts, to recover 4,000 hogsheads of tobacco. The declaration consisted of *two* counts; one charging the trover and conversion to be, *before either* of the bankrupts had committed an act of bankruptcy; the other charging it, *subsequent* to an act of bankruptcy committed by *both* the bankrupts.

Barnes,

Barnes and *Ridgate* were partners; *Ridgate* lived in *England*, and *Barnes* lived in *Maryland*. 1776.

FOX *versus* HANBURY.

Ridgate was under very large acceptances, and much pressed for money. To support his credit, *Hanbury* agreed to pay, and actually did pay, several bills for him. But with a view to better carrying on the business, *Ridgate* was to go to *Maryland*, and *Barnes* was to come to *England*. *Hanbury* interposed his credit, upon the confidence of consignments of tobacco being made to him, which would be a pledge for the monies he advanced.

Ridgate told his clerk that he was going to *Maryland*, and that *Barnes* would come over to *England*; but bid him say, the day he set out, that he was gone to *Hanbury*'s country house, and would return soon. *Mauduit*, a creditor, called, and had that answer. *Ridgate* went to *Maryland*, and *Barnes* came to *England*.—No umbrage was taken by the creditors at this exchange of the residence of the two partners: Neither *Ridgate*, *Barnes*, or *Hanbury* had an idea that this exchange of residence was an act of bankruptcy. There was no intention to commit an act of bankruptcy.

Consignments of tobacco were made by *Barnes* to *Hanbury* before *Barnes* left *Maryland*, and there were other consignments afterwards. Upon the 22d of *January* 1773, *Barnes*, after returning to *England*, committed an act of bankruptcy, and afterwards publicly failed. Then, and not before, the creditors set up *Ridgate*'s going to *Maryland* as an act of bankruptcy by him, and they took out a joint commission against both; and the plaintiffs, in the capacity of assignees under the commission, brought the present action.

Whether *Ridgate*'s going to *Maryland*, under the particular circumstances beforementioned, should be construed an act of bankruptcy, was a question much litigated at the trial. The jury, upon the misrepresentation to *Mauduit* beforementioned, were of opinion it was; and accordingly found him a bankrupt upon the 15th of *July* 1772, the day on which he left *London*. No *fraud* or want of consideration was fixed upon *Hanbury*. But the plaintiffs insisted, that all the consignments *after* the 15th of *July* 1772, were *void*. The defendants insisted, that all the consignments *before* the 22d of *January* 1773, were *good*. There were consignments after the 22d of *January* 1773, which the defendants could not support; and therefore, as to them, an account was necessarily to be taken of the value of the tobacco, which so came to the hands of the defendants, after making just allowances.

That

1776. That account was referred to an arbitrator; and the queſtion, whether the plaintiffs were entitled in this action, to recover the *whole* of the value of the conſignments made by *Barnes* between the 15th of *July* 1772, and the 22d of *January* 1773, or a *moiety* thereof, was ſubmitted to the opinion of the court: And according to ſuch opinion, ſuch conſignments are to ſtand or fall, and to be brought into, or left out of the account, by the arbitrator.

Fox *verſus* Hanbury.

This caſe was argued twice, firſt in *Hilary* term laſt by Mr. *Wallace* and Mr. *Buller* for the plaintiffs, and Mr. *Mansfield* and Mr. *Dunning* for the defendants. The court then ordered it to be argued by one counſel on each ſide this term. It was accordingly argued by Mr. *Buller* for the plaintiff, and Mr. *Mansfield* for the defendant.

Mr. *Buller* for the plaintiffs inſiſted, *1ſt*, That the conſignments were fraudulent, being with a view to give the defendants a preference, and therefore void for the whole. *2dly*, If not void for the whole, the plaintiffs were at leaſt entitled to a *moiety*: For by the bankruptcy of *Ridgate*, the partnerſhip was immediately diſſolved; and ſo it was held by Lord *Mansfield* and *Yates* Juſtice, in the caſe of *Hague* and others, aſſignees of *Scot* againſt *Rolleſton*, 4 *Bur.* 2174. If ſo, *Barnes*, the ſolvent partner, had no longer a power over the whole, but each had his own moiety only to give or grant. If an execution iſſued againſt one of two partners, the ſheriff, though he may ſeize the whole, can only ſell an undivided moiety. *Heydon* verſus *Heydon*, 1 *Salk.* 392. By the ſame rule, a bankruptcy ſevers from the time; for a bankruptcy is an execution in the firſt inſtance. From the moment, therefore, that *Ridgate* failed, the power of *Barnes* to bind the whole of the partnerſhip effects ceaſed; conſequently, the plaintiffs were entitled to a moiety.

Mr. *Mansfield* for the defendant, *contra*, contended that the plaintiffs could not recover on either count. For if the goods were the property of both the partners, as alleged in the firſt count, each had a right to diſpoſe of the whole; and the conſignment by one partner was the conſignment of both. That here there was not even a ſuggeſtion of fraud; and conſequently no ground of action to entitle them to recover upon that count. As to the 2*d* count, he argued that the bankruptcy of one partner was not to all purpoſes a diſſolution of the partnerſhip. But ſuppoſing it were, and that the aſſignees became entitled to an undivided moiety, they ſhould in that caſe have declared as the aſſignees of *Ridgate* only; not as the joint aſſignees of both the partners.

ners. But even in that ſhape, the action could not have been maintained; for then the aſſignees and the ſolvent partner would have been *tenants in common*: and *trover* or detinue does not lie by one tenant in common of chattels perſonal againſt another. *Litt. Sect.* 323. Therefore the plaintiffs had no title to recover.

1776. Fox *verſus* HANBURY.

Lord MANSFIELD.—The ſingle queſtion is, Whether the act of the ſolvent trader for a valuable conſideration, is good, after an act of bankruptcy committed by his partner, without his knowledge, and without the leaſt colour or mixture of fraud. Whether the aſſignees can, in ſuch a caſe, come againſt the *bonâ fide* conſignee of the ſolvent partner, to recover the value of the goods conſigned. The aſſignees ſtand in the place of the bankrupt, and can in no caſe be in a better ſituation than the bankrupt himſelf would have been in, under the ſame circumſtances. Suppoſe in this caſe, the partnerſhip had been diſſolved, and the tobacco had been in the poſſeſſion of *Barnes*: What action could *Ridgate* have had againſt theſe goods ſpecifically? Would he have been entitled to any thing but the balance of the account?

Cur. adviſare vult.

Afterwards, on this day, Lord *Mansfield*, having ſtated the caſe (*ut antea*) delivered the opinion of the court as follows:

The queſtion for the opinion of the court is a general one; Whether aſſignees, under a joint commiſſion againſt two partners, taken out after the bankruptcy of both, can maintain an action of *trover* againſt a perſon in poſſeſſion of goods under a ſale or conſignment *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner.

An act of bankruptcy by one partner, is to many purpoſes a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes, which avoid all the acts of a bankrupt from the day of his bankruptcy; and from the neceſſity of the thing, all his property being veſted in the aſſignees, who cannot carry on a trade.

In the caſe of *Hague* verſus *Scott*, *Hil.* 8 *Geo.* 3. *B. R.* cited by Mr. *Wallace* and Mr. *Buller*, it was held, that the ſtatutes concerning bankrupts made an *entire*, *not a partial avoidance* of the *bankrupt*'s acts, as well in reſpect of his partner's moiety, as his own. But no caſe has been cited, where a ſecret act of bankruptcy by one partner, has been held to avoid an honeſt conveyance of partnerſhip effects by the other. Each has a power ſingly to diſpoſe of the whole of the partnerſhip effects.

There

1776. There are no words in the ſtatutes expreſsly applicable to this caſe; and there is great reaſon why they ſhould be avoided. If partners diſſolve their partnerſhip, they who deal with either, without notice of ſuch diſſolution, have a right againſt both. After a diſſolution by agreement, by an execution, or by a bankruptcy, the partner out of poſſeſſion of the partnerſhip effects, has the ſame lien on any new goods brought in, which he had upon the old. But ſuppoſing that a ſecret act of bankruptcy of *one* partner is a complete diſſolution of the partnerſhip, and that from that moment the aſſignees and the ſolvent partner are to be conſidered as tenants in common of the partnerſhip effects; the queſtion will ſtill remain, Whether the plaintiffs have any right to recover in this action?

Fox *verſus* Hanbury.

This leads me to conſider what right in law and juſtice one partner has againſt another, after a diſſolution of the partnerſhip.—It clearly is not to change the poſſeſſion, or to make an actual diviſion of ſpecific effects. One partner may be a creditor of the partnerſhip to ten times the value of all the effects. The other partner in that caſe can only have a right to an account of the partnerſhip, and to the balance due to him, if any, on that account. No perſon deriving under the partner can be in a better condition. His executor ſtands exactly in the ſame light, It is the very text of *Littleton*. In *Sect.* 321. he ſays, "If there be "two tenants in common of a perſonal chattel, and one dies, the "executors ſhall hold and occupy with the ſurvivor, as their teſ-"tator did before he died." If a creditor takes out execution againſt one partner, as in 1 *Salk.* 392, the vendee would be tenant in common. And in the caſe of *Skipp* verſus *Harwood* in Chancery, 6th *July* 1747, Lord *Hardwicke*, according to my note, ſays, "If a creditor of one partner takes out execution againſt "the partnerſhip effects, he can only have the undivided ſhare of "his debtor; and muſt take it in the ſame manner the debtor "himſelf had it, and ſubject to the rights of the other partner."

The aſſignees, under a commiſſion of bankruptcy againſt one partner, muſt be in the ſame ſtate. They can only be tenants in common of an undivided moiety, ſubject to all the rights of the other partner. This is clearly laid down in that caſe of *Skipp* verſus *Harwood*, which is tolerably well reported in 1 *Vezey* 239.* And I refer you to that report, to avoid taking up ſo much time as would be neceſſary to ſtate it from my own notes.

* It is there reported by the name of *Weſt* v. *Skip*.

My

My general memory of the principles explained in that case, and the strong sense upon which this proposition is founded, that one partner can have no right against the other, but to what is due from him after making him all just allowances, induced me, without hesitation, to declare my opinion at the trial; that the consignments endorsed by *Barnes before* the 22d of *January* 1773, the day *Barnes* became a bankrupt, could not be avoided by the plaintiffs, either for the *whole* or a *moiety*, on account of the bankruptcy of *Ridgate*. But the matter being of value, and no precedent cited, I wished them to take the opinion of the court.

When it was first argued, the defendant's counsel said little or nothing, expecting to reply; which raised doubt enough to make us order it to be put in the paper. Now, that it is fully understood, we are all clearly of opinion that the action cannot be maintained.

Supposing the indorsement by *Barnes*, of the bills of lading, not to bind the undivided moiety of the assignees, which is the utm ost the plaintiffs can contend for, then, this is an action of *trover*, by one tenant in common against another, which cannot be: The text of *Littleton* says so, *Coke*'s comment says so, the adjudged cases say so, and there is no judgment or *dictum* to the contrary. The text of *Littleton*, *Sect.* 323. is as follows: "But "if two be possessed of chattels personal in common, and one "take the whole to himself, out of the possession of the other; "the other has no remedy but to take this from him, who hath "done the wrong, to occupy in common, &c. when he can see "his time, &c." Lord *Coke*, in his comment on this passage, 200 *a.* says, "If one tenant in common takes all the chattels "personal, the other has no remedy by action; but he may take "them again."

So, in *Brown* versus *Hedges*, *Trin.* 7 *Ann. B. R.* 1 *Salk.* 290. Upon a case made for the opinion of the court, the second point resolved was this: "One joint tenant, tenant in common, or "parcener, cannot bring *trover* against another, because the pos- "session of one, is the possession of both; if he does, it is "good evidence, upon not guilty: But if one joint-tenant bring "trover against a stranger, in that case the defendant may plead "it in abatement; but cannot take advantage of it in evidence." —The reason is unanswerable; there is no conversion.

Upon these authorities, we are of opinion that the action cannot be maintained; and consequently, that the consignments *prior* to the 22d of *January* 1773, are not to be brought into the arbitrator's accounts

1776.

Same day.

Rowls *versus* Gells *et al.*

The lessee [under the crown] of lead mines, is rateable to the poor for the profits arising from *lot* and *cope*; which are duties paid him by the adventurers, without any risk on his part.

THIS was an action of trespass, brought by the plaintiff against the defendants, for taking lead ore, as a distress for the poor's rate. The cause was tried at *Derby* at the Lent assises 1776; when the jury found a verdict for the plaintiff, damages 13 *l.* 14 *s.* subject to the opinion of the court, upon a case stated, which in substance was as follows:

That the plaintiff, in consideration of 1560 *l.* paid to his Majesty as a fine, was admitted tenant for 31 years of "all those "mines of lead with their appurtenances, within the soak and "wapentake of *Wirksworth*, with the *lot* and *cope* within the "said soak and wapentake under the yearly rent of 144 *l.*"

That the plaintiff was assessed to the poor of the township of *Wirksworth*, under a monthly rate, dated the 19th of *April* 1775, in the words and figures following; "*Rowls, John*, Esq. "for *lot* and *cope* at 500 *l. per ann.* 12 *l.* 10 *s.*" And on the plaintiff's refusing to pay the same, the defendants, who were two justices of peace, regularly issued their warrant of distress; by virtue of which, the ore in question was seised and sold for the sum of 13 *l.* 14 *s.*—12 *l.* 10 *s.* of which were detained for payment of the above rate, and the remaining sum of 1 *l.* 4 *s.* was duly tendered to the plaintiff before the action brought.

That the duty *of lot*, payable to the plaintiff as lessee of the crown, is the 13*th dish* or measure of *lead ore* got, *dressed*, and made *merchantable* at all the lead mines within the said soak or wapentake of *Wirksworth*. That *cope* is 6 *d.* for every load or nine dishes of lead ore *raised* at such mines. That the said township of *Wirksworth* is part of, and within, the said soak or wapentake: And that the said duties of lot and cope are paid to and received by the plaintiff, as lessee of the crown; without any *risque* or *expence* in working the mines: and that in the year 1775, the said duties amounted to the clear sum of 500 *l.* but that they are *uncertain*, and *vary* every year.

That all the King's subjects have a right to dig for and get lead ore within the said soak and wapentake of *Wirksworth*, paying the lord's duties, and conforming to the mineral customs used within the said soak and wapentake; and that the miners, or proprietors of such mines, within the said soak and wapentake, are entitled to a privilege of using seven yards and a quarter of land, in breadth, adjoining on each side of the mine or vein, so

far

far as the mine or vein extends in length, for the purpose of working the mine, which is called "quarter cord;" and his Majesty, or his lessee, is also entitled to a *mere* of ground, being 29 yards in length, in every new vein, with the like privilege of quarter cord on each side his mere. 1776. Rowe *versus* Gilch.

That great quantities of land, within the said soak or wapentake of *Wirksworth*, are annually rendered of little or no value, by working the mines.

That in the said soak or wapentake of *Wirksworth*, the said duties have not hitherto been assessed to the poor until the present rate; but that in the township of *Winster* in the hundred of *High Peak*, which adjoins the said soak or wapentake, his Grace the Duke of *Devonshire* has been assessed and paid to the poor's rate there for the like duties, for about 40 years last past.

That the miners or proprietors of lead mines in the county of *Derby*, have not been rated to the relief of the poor in respect of their said mines there.

The question was, Whether, under the circumstances of this case, the plaintiff was liable, in respect of the said duties, to be assessed to the poor's rate for the township of *Wirksworth?*

Mr. *Buller*, for the plaintiff, insisted, that this species of property was not assessable to the poor; and cited the case of the *governor and company for smelting lead* versus *Richardson et al. Mich.* 3 *Geo.* 3. *B. R.* 3 *Bur.* 1,341. and *Rex* versus *Vandevelt. Pasch.* 33 *Geo.* 2. 2 *Bur.* 991.

Mr. *Wheeler contra*, for the defendants. Both the cases cited are distinguishable from the present. In *Rex* versus *Vandevelt* the court held the quit-rents of a manor were not assessable; but the ground of the decision was, that the land itself was before assessed: And therefore, if the lord were liable, it would be a double assessment. In the other case, the mine itself was assessed, which could not be, on account of the great uncertainty and hazard attending the adventure. But here the mine itself is not assessed, nor are the miners in any respect affected. But it is the share of profit accruing to the lord, which is rated as incident to, and in respect of, the soil, and by way of recompence for the injury done the soil: and he compared it to the case of *Mills* which have been held rateable.

Cur. advisare vult.

Lord *Mansfield* now delivered the opinion of the court as follows:

The poor's rate is not a tax on the land, but a personal charge in respect of the land. The present is a personal charge by

 reason

1776. reason of the annual profits which the lessee of the crown receives out of the land, and which is not charged at all before to the poor. In general, the farmer or occupier of land, and not the landlord, is liable to this tax. For it arises by reason of the land in the parish; and the landlord is never assessed for his rent; because that would be a double assessment, as his lessee has paid before.

ROWLE *versus* GELLS.

Lead mines are not within the stat. 43 *Eliz.* They are in themselves uncertain, and may prove unsuccessful to the adventurers. Taxes therefore upon the adventurers would be hard, and they are excused. But the person, lord or landlord, who, in case they do prove of value, receives a stipulated benefit from the profits or value of them, is not excusable upon the same ground: And therefore, is expressly charged to the land-tax, as that falls upon the landlord. He is alike liable to the poor's rate, for his visible real property in the parish; though, where the poor's tax is a charge on the lessee, the landlord does not pay in respect of his rent.

Where the adventurer or lessee of the mine pays nothing, it is no double tax in any light; because the lord pays, *not* for that, which the *lessee* or adventurer is *excused* from paying for; but the lord pays for *his own*. It is not a mere casual profit, but an annual revenue, *if any*; and very different from the casual profits of a manor, which are not annual; for there may be none for years. But if the mine produces profit to the miner, the lord's share is *certain*, annual, and an annual rent is paid for it constantly. The miner is obliged to pay certain proportions to the owner of the land. What reason then is there to exempt these proportionable revenues? It makes no difference to the adventurer; it does not prejudice or benefit him. But as such obligatory payment is in respect of the land, the land owner ought not to receive it clearer or neater than any other part of his estate, when he is at no trouble, expence, or possible risk. Therefore, we are all of opinion, that the plaintiff is liable to be rated for this property.

Per Cur.—*Postea* to be delivered to the defendants.

1776.

FOSTER *versus* BONNER.

Same day.

In *B. R.* if the plaintiff prove a trespass or injury *before* the *bill filed*, though *after* the *latitat returned*, it is sufficient. For, by the general rule and course of the court, the *bill* is the *commencement of the suit*; and the *latitat*, except where it is *replied to* the *statute* of *limitations*, or to *avoid a tender*, or where it is *given* in *evidence* to support a *penal action* in point of time, is considered but as *process*.

THIS was an action of trespass on the case tried at the Lent assises at *Maidstone* 1776, when the jury found a verdict for the plaintiff, subject to the opinion of this court upon a case stated, which was in substance as follows:

The plaintiff was possessed of four ancient ferries across the river *Thames*, and entitled to receive certain sums of money for carrying passengers over the said ferries.—On the 22*d of August* 1775, the plaintiff sued out a writ of *latitat* against the defendant, which was served a day or two after; and in *Michaelmas* Term following, exhibited his bill and declared against him in a variety of counts, for erecting new ferries near the plaintiff's, and for carrying passengers over the river on the 17th of *August* 1775, and on several other days and times between that day and the day of the exhibiting the plaintiff's bill, &c. to the prejudice of the plaintiff, and to the disturbance of his said right.

It was proved at the trial that the defendant had carried several persons over the river in the defendant's boats upon the 25*th* of *September* 1775, and at other times between that day and the trial of the cause; but there was no proof of the defendant's having carried over any person previous to the 25th of *September*.

The question for the opinion of the court was, "Whether "the plaintiff, not having proved that the defendant had carried "over any person, *before* the plaintiff sued out his writ of *latitat*, "was entitled to recover in this action?"

This case was argued on *Friday*, *May* 3d, in this term, by Mr. *Wallace* for the plaintiff, and Mr. *Morgan* for the defendant; when the court took time to consider.

Lord *Mansfield* now delivered the opinion of the court as follows.—It is admitted, that the plaintiff, at the time of suing out the *latitat* upon the 22d of *August*, had no cause of action. It must also be admitted, that if, at the time of the *commencement of the suit*, the plaintiff had no cause of action, a subsequent right of action will not support the present action brought.

The question therefore is, What is the commencement of the suit in this case; or when must this action be said to be brought?

It is laid down in *Wood* versus *Newton*, 1 *Wils.* 147, that in general, the suing out a *latitat* is not material: that it is not

 considered

1776. considered as the *commencement of the suit*, but as *process* only to bring the party into court.—It is laid down in other cases, in 1 *Vent.* 28. *Hanway* versus *Merry*: in *Penny* versus *Kirk*, *Hil.* 11 *Geo.* 1. 8 *Mod.* 343. and in *Johnson* versus *Smith*, 2 *Bur.* 960; and by the general course of this court, that the action is not deemed to be brought, till the *bill* is filed; and *that* is the *commencement* of the *suit*.

FOSTER *versus* BONNER.

The form of pleading a tender of amends, or the statute of limitations, shews this: For, as in the *Common Pleas*, where the suit is by original, it is pleaded, *ante impetrationem brevis*; so in this court, it is said, *ante exhibitionem billæ*. The *bill*, therefore, is considered as an *original writ*; and it is the first step on the record. The want of a bill is the common error assigned; as the want of an original is, in the *Common Pleas*; and both are alike cured after verdict. If the plaintiff, therefore, duly proves a trespass or injury before the exhibiting the bill, it is sufficient.

But further, that the time of suing out the *latitat* is not material, as before is laid down, appears from the stat. 12 *Geo.* 1. *c.* 29. amended by the stat. 5 *Geo.* 2. *c.* 27. and made perpetual by the stat. 21 *Geo.* 2. *c.* 3. For thereby, where the plaintiff does not hold the defendant to special bail by affidavit and a special *ac etiam*, (which he is then bound to pursue and declare accordingly,) the sheriff or his officer can now only personally serve the defendant with a copy of the writ or process; and with notice in writing thereon, to appear by his attorney in court and defend the action; which, in effect, reduces it to a mere *summons*. And if the defendant appears upon this notice, he puts in common bail. If he does not appear upon the return of the writ, within four, or, in some cases, eight days after, the plaintiff may enter an appearance for him, and file common bail in his name.

And in such cases, where the defendant is so brought into court by a bill of *Middlesex*, upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper. So that upon such a summons to bring the defendant into court, the plaintiff's *filing* his *bill*, is most properly called the *commencement of his suit*. That is the only thing, according to the cases beforementioned, which were prior to the statutes, that the court is to take notice of. The *latitat* may be *before* the cause of action; but the *declaration* cannot be, till *after* it arises.

It has been frequently said however, upon certain occasions, that a *latitat* out of this court, is, or may be taken to be, in nature of an *original* in the *Common Pleas*. *Styles* 156. 1 *Wilf.* 147. yet on a subsequent argument in the first case, *Styles* 178. it was not admitted in reply to the statute of limitations, but adjourned on a difference of opinion. 1776. FOSTER versus BONNER.

But since it has been admitted in such a light, the plaintiff has made it the commencement of his suit, to avoid the plea of the statutes of limitations, or of a tender before the exhibiting his bill. The defendant has also had the benefit of shewing in such a case, the true time of the writ's issuing; and, as in *Wood* versus *Newton* *, that there was *no cause* of action subsisting at the time of suing out the *latitat*, when the plaintiff had replied a *latitat*, to avoid the defendant's plea of a tender. The doctrine in *Joanson* versus *Smith* † is to the same effect.

* 1 *Wilf.* 147.

† 2 *Bur.* 960.

In *Culliford* versus *Blandford*, *Carthew* 233. and in *Hardiman* versus *Whitaker*, *Mich.* 22 *Geo.* 2. *B. R.* the *latitat* was held a good commencement of the suit in a penal action to avoid a nonsuit. The latter case was as follows: By the *stat.* 8 *Geo.* 1. *c.* 19. all suits and actions are directed to be brought, *before* the *end* of the *next term* after the offence committed. The offence was charged upon the 27th of *January*; the *memorandum* was of *Trinity* Term, and the declaration was, that the defendants *after* the *first* day of *Hilary* Term, and before the exhibiting the plaintiff's bill, *viz.* on the 27th of *January*, kept a lurcher. So that on the face of the declaration, it was after the time allowed by the statute. But the plaintiff proving in fact, at the trial, when the *latitat* was sued out, and that being within the time, it was holden sufficient.

In all such cases the defendant has an equal advantage with the plaintiff, to shew the truth, as it really is, *viz.* That the action is brought or not, or that the tender is made or not, *within the proper time*.

But these particular cases under the statutes, do not affect the general rule and course of the court, as to the commencement of the suit in *R. B.* being by the bill. For when the suing out a *latitat* is not replied to the statute of limitations, or to avoid a tender, or given in evidence to support a penal action in point of time, it is considered but as *process*, and not as the commencement of the suit. And, Mr. Justice *Dennison*, in *Wood* versus *Newton*, speaking of a *latitat*, and considering it only as *process*, says, " *when* the *process* issues, is not material."

1776.

FOSTER *versus* BONNER.

In this case it is but *process;* and therefore, if the injury is done *before the action brought*, it is sufficient. And the action is not brought till the bill filed.

Upon the whole, *as to a latitat;* under the statute of limitations and the statutes relative to the time when penal actions are to be brought, it has there been considered in nature of an original in *C. B.* But under the general practice of the court, and the statutes to prevent vexatious arrests, it is a mere process or summons, and it's time of issuing immaterial.

Therefore we are of opinion that the verdict ought to stand.

The consequence is, that the *postea* must be delivered to the plaintiff.

THE END OF EASTER TERM.

TRINITY TERM

16 George III. *B. R.* 1776.

Rex *versus* James Roupell.

Friday, June 7.

A *certiorari* lies to remove a *presentment* in a court leet; and when removed, the presentment is traversable in *B. R.*

MR. *Dunning* had obtained a rule to shew cause why a *certiorari* should not issue to remove a *presentment* against the defendant, in the court leet of the *Savoy*, for keeping a dis orderly house, on which he had been amerced 50 *l.*

Mr. *Wallace* now shewed cause, and insisted that it had been settled by a variety of authorities, that a presentment in a court leet of an offence which is *not capital*, nor concerning any *freehold*, subjects the party to a fine or amercement *without any further proceeding*, and binds him *for ever* after the day on which it is found; and admits of *no traverse* to the truth of it: and cited 2 *Hawk. Pl. C. c.* 10. *f.* 75, where it was in terms expressly so agreed. If so, the court will not permit a traverse of the presentment here: and if not, a *certiorari* would be fruitless. As to the ground upon which the application has been made, that the defendant had no notice of the presentment, and therefore has not been heard in his defence; the answer is that no notice is necessary. But suppose he were not heard; he is not without remedy, and may be heard if he pleases, in an action of trespass which is open to him, and which is his proper remedy. Therefore he hoped the rule would be discharged.

Mr. *Dunning* in support of the rule contended, that the defendant ought to have had *notice* of the presentment, and an *opportunity to defend* himself. He said, the grounds of his motion were two; *First*, That the presentment did not contain a sufficient charge; and therefore ought to be quashed. *Secondly*,

1776. ly, that if neceffary, it might be traverfed; which he infifted the party had a right to do: and cited *Rex* verfus The juftices of *Wiltfhire*, where the court of *R. B.* directed a *mandamus* to the juftices in feffions to admit a general traverfe of a prefentment by a juftice on view, for not repairing a highway. *Vide* this cafe, 3 *Bur.* 1,532. and 1 *Black.* 467.

Rex *verfus* James Roupell.

After the prefentment is returned, this court may either iffue procefs upon it, if it fhould be holden good; or may fend it back to the court leet to proceed themfelves; or an action may be brought upon it. Therefore no embarraffment can arife from the court granting a *certiorari.*

Mr. *Howorth* on the fame fide. The queftion before the court is not, whether a prefentment in a court-leet is traverfable; but whether a *certiorari* lies to remove a prefentment in a court leet? But as to its not being traverfable; notwithftanding the authority of *Hawkins*, it has been exprefsly determined in a cafe of *Matthews* verfus *Cary*, *Carth.* 74.* that a prefentment in a court-leet *is traverfable.* "Befides" (fay the court) "if this prefentment fhould be removed by *certiorari* into *R. B.* "it is clear that it is traverfable there; and if in courts fuperior "to the leet, *a fortiori* in prefentments at the leet." Therefore this is an authority as to both points. In 1 *Salk.* 195. exceptions were taken as to a prefentment in court-leet: And in 1 *Salk.* 200. a prefentment at a leet was removed by *certiorari* and exceptions taken to it. It is clear, therefore, that a *certiorari* does lie to remove a prefentment from a court-leet, and there is no ftatute that takes it away.

* 3 *Mod.* 137. S. C.

Lord *Mansfield* wifhed the precedents to be accurately looked into, and therefore ordered the cafe to ftand for further argument.

Afterwards, on *Thurfday* the 20th of *June* in this term, Lord *Mansfield* mentioned this cafe, and faid, The court has looked very particularly into all the cafes and confidered them attentively. And we are clear that a *certiorari* ought to go. The prefentment cannot be traverfed at the leet, but the proper method is to grant a *certiorari*, that it may be traverfed here. There are many authorities which fay, a prefentment may either be traverfed by being removed into the *King's Bench* or in an action. It cannot be true that it is *not traverfable any where.* The defendant has never been heard at all; and it would not be juft that he fhould be condemned and fined unheard. And as he cannot traverfe the prefentment at the leet; he ought to have a *certiorari* to remove it in order to traverfe it here.

Aston

ASTON Justice.—The old authorities are clear that there ought to be a *certiorari.*

In *Dyer* 13. *pl.* 64. *Fitzherbert* said, that *Briton*, who is a good authority, said, that every presentment is traversable which is presented in a leet; and also in the sheriff's tourne, out of which leets were at first derived; which is taken notice of in *Matthews* versus *Carey*, 3 *Mod.* 137.—In *Finch* 386. *octavo* edition, it is said, "the course is to remove such presentments into the *King's Bench* by a *certiorari*, where the party may traverse them."

It would be a strange doctrine to say the defendant should have no opportunity of being heard. This would give a court-leet a power superior to that of any other jurisdiction in the kingdom; as was observed by Mr. Justice *Yates* in *Rex* v. Justices of *Wiltshire*. Therefore what is said in 2 *Hawk.* 71. namely, that it is not traversable *any where*, is a mistake. It is not traversable in the court-leet, but it is traversable when removed hither; and that is the reason why a *certiorari* ought to go.

Lord *Mansfield* added, another reason for granting a *certiorari* is, that the defendant may have an opportunity of taking *exceptions* to the presentment itself, in point of form or otherwise—Therefore let the rule be made absolute for a *certiorari*, to prevent the expence of arguing it; for we have looked very particularly into it, and are clearly of opinion, a *certiorari* will lie.

EX PARTE ADNEY.

Tuesday, June 11th.

A. in consideration of 1*l.* 10*s.* 7*d.* received of *B.* undertakes *in writing* to make himself liable for the due payment of a note, upon which *H.* was then indebted to *B.* and *B.* thereupon consents to furnish *H.* with more goods: and then *A.* before the note was due becomes bankrupt. Held that *A.*'s undertaking was intended as a *collateral* engagement only, *in case* H. should not pay the note when due. Consequently, as it rested in contingency, whether it would ever become a debt or not, it could not be proved as such under *A.*'s commission.

THIS was a case from *Chancery* in substance as follows:

On the 10th day of *June* 1773, *James Adney*, a broker, sold to *George Henshaw* quantities of *Russia* tallow, the property of *John Buckholme*; and there being a balance of 280 *l.* 18 *s.* 4 *d.* due to *Buckholme*, *Adney* gave *Buckholme*, *Henshaw*'s note, dated the 12th day of *June* 1773, for 306*l.* 13*s.* payable to *Buckholme*, five months after date, being the price of the said tallow.—In *July* 1773, *Henshaw* wanting more tallow, *Adney*, as broker, applied to *Buckholme* to sell it him; when *Buckholme* told him, that as *Henshaw* was indebted to him at that time as above, and

1776. as he had no other security than the above note, he declined giving him further credit; whereupon *Adney* answered *Buckholme*, that *Henshaw* was a safe man; that the note would be regularly paid, and that he might safely give him credit for more goods; that he, *Adney*, in consideration of the sum of 1 *l.* 10 *s.* 7 *d.* paid him as a premium, would guarantee or secure the payment of the said note; which proposal *Buckholme* agreed to; and paid him the 1 *l.* 10 *s.* 7 *d.* and afterwards delivered more goods to the use of *Henshaw*; and *Adney*, on the 12th *July* 1773, gave *Buckholme* the following undertaking signed by him, *viz.*

Ex parte ADNEY.

"In consideration of the sum of 1 *l.* 10 *s.* 7 *d.* received of "Mr. *John Buckholme*, I hereby make myself answerable for the "due payment of *George Henshaw*'s note; date the 10th of *June*; "Order *J. Buckholme*, for 306 *l.* 13 *s.* payable in five months, "and due the 10th of *November*."

On the 8th day of *September*, 1773, a commission of bankrupt issued against *Adney*; and he was declared a bankrupt. *Henshaw* did not pay the note when it became due, but continued his trade till the 2d of *December*, 1773; when a commission of bankrupt was issued against him, and he was declared a bankrupt.

Buckholme having petitioned the Lord Chancellor for liberty to prove the debt of 306 *l.* 13 *s.* under *Adney*'s commission, his Lordship, on the petition's coming on to be heard, ordered that a case should be made for the opinion of the judges of his Majesty's court of *King's Bench*, upon the following question: "Whether "the said engagement, so entered into by the said *James Adney*, "is or shall be considered as a *debt* due from the said *James* "*Adney*, *before* the date and issuing forth of the said com-"mission against him, so as to be proved by the said *John Buck-*"*holme* under the said commission? or, Whether the said en-"gagement is to be considered, as a *collateral security* from the "said *James Adney* the bankrupt to the said *John Buckholme*, "for the payment of the said sum of 306 *l.* 13 *s.* mentioned in "the said note, *in case* the said *George Henshaw* did *not* pay the "same, at the time the said note became payable; and conse-"quently a debt only accruing due from the said *James Adney* "to the said *John Buckholme* from the time default was made "by the said *George Henshaw* in payment of the said note?"

Mr. *T. Cowper* for *Buckholme*. This is a debt, which, if *Henshaw* had become bankrupt, *Buckholme* would clearly have been entitled to prove under *Henshaw*'s commission. The case there-

therefore is precisely the same upon *Adney*'s becoming bankrupt; because he undertakes, in express terms, to pay the amount of the note, when due. There is no condition, no defeazance, no qualification, no contingent even provided for; but he makes himself answerable for the payment of *Henshaw*'s note, payable at five months. It is in terms, therefore, a debt payable at a *future* day *certain*; and consequently, within the very letter and provisions of Stat 7 *Geo.* 1. *c.* 31. made expresly for the relief of creditors in such cases. 1776. *Ex parte* ADNEY.

Mr. *Walker contra.* This is not such an undertaking as made *Adney* debtor to *Buckholme* at the *time* of the *bankruptcy*; consequently, if *Buckholme* cannot swear that *Adney* was justly and truly indebted to him at the date and suing forth of the commission, and that he still is so, he cannot be admitted a creditor under the commission. That he cannot is plain, because *Adney* can be answerable no further than *Henshaw* himself was, and *Henshaw* was not liable to pay it till a future day, *viz.* the 10th of *November*; it was contingent, therefore, till that day at least. But this was only by way of collateral security, in case *Henshaw* did not pay; consequently, till default by *Henshaw*, *Adney* was not liable.—He cited *Goddard* versus *Vanderheyden*, *Mich.* 12 *Geo.* 3. *C. B.* * where the court determined, that bail, who had not paid the debt and costs till *after* the bankruptcy of the principal, though judgment on the bail-bond was had *before*, were not barred by the certificate of the bankrupt; because, till actual payment, the damnification did not accrue, there being till then a possibility that the effects of the defendant might pay. So here, even after *Adney*'s bankruptcy *Henshaw* might have paid; consequently the debt, if any, not having accrued till *after* the bankruptcy of *Adney*, is not such a debt as can be proved under his commission.

* 3 *Wils.* 262.

Mr. *Cowper* in reply admitted, that in *Goddard* versus *Vanderheyden* the certificate was no bar, because the bail were clearly not fixed till after the bankruptcy; and perhaps never might have been. But he compared this, to the case of *Adney*'s having joined in the note with *Henshaw*, or to his having indorsed it; in which latter case he insisted, that though *Adney* might not have been liable till after demand made upon *Henshaw* the drawer, and default by him; yet it was clearly such a debt as might be proved under *Adney*'s commission.

Lord MANSFIELD.—There can be no doubt or argument in this case upon any general principle of law. It is very certain that contingent

1776. contingent debts cannot be proved under the ſtat. 7 *Geo.* 1. *c.* 31. and debts payable at a future day are not to be proved unleſs they come within the ſtat. 7 *Geo.* 1.

Ex parte ADNEY.

It is as certain, that, if this be only a *collateral* undertaking to pay *if Henſhaw did not*, the demand cannot be proved under *Adney*'s commiſſion, But if it be an engagement by *Adney* to pay *at all events*, without regard to *Henſhaw*; then, it is a debt that may be proved under *Adney*'s commiſſion: and ſo the court of *Chancery* clearly underſtood it, by the terms in which the caſe, and the queſtion ſent for our opinion, are ſtated.

The law is equally clear, which ever way the undertaking is conſtrued: and the whole queſtion depends upon the conſtruction of three lines of the engagement. It might be meant as a collateral undertaking only; *viz.* in caſe *Henſhaw did not pay*, that then *Adney* would be liable for the debt. But it is not worded ſo.

The original undertaking by *Henſhaw* is a regular negotiable note, and if *Adney* had indorſed it, though demand muſt have been made, &c. before *Adney* would be liable, yet in that caſe the debt might clearly have been proved under the commiſſion. But the engagement by *Adney* is, that *Henſhaw*'s note ſhall be paid when due; therefore, if not a collateral undertaking, there would be no neceſſity to reſort to the original drawer of the note.

ASTON Juſtice.—The queſtion is, what was meant by this undertaking? The ſmallneſs of the premium paid to *Adney*, *viz.* only 1 *l.* 10 *s.* 7 *d.* affords a ſtrong ground for ſuppoſing it was intended as a collateral undertaking only.

Lord MANSFIELD.—The whole depends upon the intention of the parties. We will conſider of it before we give our certificate.

* *June* 19th. 1776.

Afterwards * the court certified in theſe words: "Having "heard counſel on both ſides and conſidered this caſe, we are "of opinion, that from the occaſion of giving *Adney*'s note, "and the terms in which it is conceived, the parties intended "it to be a *collateral* engagement only, *in caſe Henſhaw* ſhould "*not* pay his note at the time it became due; and therefore, "it reſted *in contingency* (at the time the commiſſion iſ-"ſued againſt *Adney*), whether this engagement ever would "become a debt or not: and conſequently it could not be "proved as ſuch, under *Adney*'s commiſſion."

Foone *versus* Blount.

Tuesday, June 18th.

One seised of a real estate, by will bequeaths several pecuniary legacies, and, as to some, directs that they shall be paid to the full, whatever else, *debts excepted*, falls short: And then proceeds thus: In order to raise money for these payments, my estate of *B.* must be sold, as soon as conveniently may be after my decease. *To this end* I do appoint and empower *C.* & *D.* whom I make my executors, to *sell*, let, or set to sale both my estates of *B.* & *E.*—Held, that a creditor, who was a *Papist*, was entitled to receive his debt out of the money arising by sale of the testatrix's real estate, according to the appointment of her will.

THIS was a case out of *Chancery* for the opinion of this court; and in substance as follows:

Winifred Warham being seised in fee-simple in possession of an estate at *Benvill* of 38 *l.* a-year, and of an estate at *Elminstone* of 12 *l.* a-year, both situate in the county of *Dorset*, by her will, dated 8th *June* 1751, gave and bequeathed many pecuniary legacies, some to *Protestants*, and others to *Papists*, amounting altogether to 895 *l.* 5 *s.* and amongst such pecuniary legacies she gave to *Ann Foone* a legacy of 25 *l*: To the children of *Charity Stroud*, deceased, of which Mrs. *Compton* is one already named, there are three more, *viz. Elizabeth Wells*, *Michael Stroud*, and *John Stroud* his brother; these must have 25 *l.* each: To Mr. *George Eveleigh*, his children by his first wife, and her sister, if living, and her children, I bequeath 100 *l.* to be equally divided amongst them: All these legacies (the *Warhams* only excepted) are for the descendants of my two great aunts, *Jane* and *Agnes Boles*; these must be paid to the *full*, whatsoever else (*debts excepted*) falls short. And then comes a clause in the testatrix's will, in the following words: "In order to raise money for these payments, my estate of *Benvill* "must be *sold* to the highest bidder, so soon after my decease "as it can conveniently be done. *To this end*, I do appoint, "constitute and *empower* Mr. *Robert Pinker* and Mr. *Noah Shenwood*, whom I make executors of this my last will, to *sell*, let, "or set to sale *both my estates* of *Benvill* and *Elminstone*."

The testatrix died, without altering or revoking her said will, which the executors proved, soon after her decease.

Upon a bill filed in 1752 by *Ann Foone* a legatee and two of the simple contract creditors, against the heirs at law *ex parte paternâ et maternâ* of the said testatrix, to have the will established, the estate sold, and the money arising by the sale, together with the personal estate, applied in discharge of the funeral expences, debts and legacies, according to the directions of the will; Lord *Hardwicke*, upon the hearing in 1756, declared the will to be well proved: and directed an account to be taken, &c. And a question being made in the cause, concerning the capacity of the said plaintiff *Ann Foone* to take the legacy given to her, his Lordship reserved the consideration of that question,

1776. and also of any other question that might arise, concerning the *capacity* of any other of the legatees or of any of the *creditors*, who might come before the said Master, to claim their debts or legacies out of the said testatrix's real estate.

FOONE *versus* BLOUNT.

On the 9th of *May* 1773 the master made his report, and on the 30th of *March* 1775 the said cause came on for further directions; when Lord *Apsley*, the present Lord *Chancellor*, was pleased to direct that a case should be made for the opinion of this court, and that the question thereon should be, "Whether a "*creditor*, who is a *Papist*, is entitled to receive his debt out of "the money which has arisen by sale of the testatrix's real "estate according to the appointment of her will."

Mr. *Wallace* for the plaintiff, argued that this devise to the executors was no devise of the estate itself, but merely a *power* to them, *as executors, to sell* the land; which, therefore, descended to the heir in the mean time. That it conveyed no *interest* or use to the creditors within the stat. 12 *W.* 3. *c.* 4. nor could they have any claim upon the land itself till sold: but when sold, the money was legal assets in the hands of the executors; and consequently the creditors, Roman Catholics or Protestants, have a right to be satisfied to the amount of their respective demands.

Serjeant *Glynn* for the defendant contra, recited the latter part of the fourth section of the stat. 12 *W.* 3. *c.* 4. which, he said, in terms excluded Roman Catholics from any possible interest or profit arising out of land; by declaring, "that all and singular "estates, *terms*, or any *other interests* or *profits* whatsoever out of "lands, for the use, or in trust for the *benefit* or *relief* of any such "persons, should be utterly null and *void*." If so, it is impossible to say, that a creditor, who is a Roman Catholic, can take any benefit under the devise in question; because, in doing so, he would clearly take an interest and profit out of land of the testatrix; and that *particular interest* taken notice of by the statute, which can apply *only* to *creditors*; namely, an interest for his benefit and *relief*. A Roman Catholic therefore is incapable of suing out an *elegit*; in short, he is excluded from any possible interest or benefit arising out of land: and if this is not a benefit and *relief* out of land, it is difficult to say what is. He cited the case of *Roper* versus *Radcliffe*, 9. *Mod.* 167. 208. which, he said, was not exactly parallel; but by analogy was applicable to the case in question. There, the House of Lords held, that a devise, of the *surplus* of money arising from the *sale* of *lands*, to a

Roman Catholic, after payment of debts, was an *interest* within 1776.
the ſtat. 12 *W.* 3: though even in that caſe the deviſee might
have been compelled to take the ſurplus of the money, and have FOONE *verſus*
been reſtrained from becoming purchaſor of the land. The de- BLOUNT.
termination, therefore, was grounded upon its being an intereſt
out of land. So here, though the Roman Catholic creditors cannot
acquire the land, yet they take that *intereſt* out of it, by its being
applied in diſcharge of their debts, which the ſtatute has ex-
preſsly declared they are incapable of taking. Therefore he
prayed the opinion of the court in favour of the heir at law.

Lord MANSFIELD.—The ſhort ſtate of the caſe is this: The
teſtatrix leaves ſeveral pecuniary legacies; and gives a preference
as to ſome, by directing they ſhall be paid to the full, whatever
elſe, *debts only excepted*, ſhould fall ſhort: not a ſyllable more
is added about debts. Then the teſtatrix adds the following
clauſe. "In order to raiſe money for theſe payments, my eſtate
" at *Benvill* muſt be ſold to the higheſt bidder, as ſoon after my
" deceaſe as it can conveniently be done. *To this end* I do ap-
" point, conſtitute, and *empower* Mr. *Robert Pinker* and Mr.
" *Noah Shenwood*, whom *I make executors of this my laſt will*, *to*
" *ſell*, *let*, *or ſet to ſale*, *both my eſtates of* Benvill *and* Elminſtone."
There is no diſpoſition of the reſidue, nor any further directions
as to how the ſurplus was to go after payment of debts and legacies.
This is no deviſe to the executors of the lands; but only a
power and authority to them *eo nomine*, as executors, to ſell the
lands for the purpoſe of paying debts and legacies.

The eſtates have been ſold and converted by the executors
into money. Some of the creditors happen to be *Roman Catholics*;
and the queſtion is, whether they ſhall be paid their debts out of
the money, which is now legal aſſets in the hands of the execu-
tors?

The ſtatutes againſt Papiſts were thought, when they paſſed,
neceſſary to the ſafety of the ſtate: Upon no other ground can
they be defended. Whether the policy be ſound or not, ſo long as
they continue in force they muſt be executed by courts of juſtice
according to their true intent and meaning. The legiſlature only
can vary or alter the law: But from the nature of theſe laws,
they are not to be carried by inference, beyond what the political
reaſons, which gave riſe to them, require.

The political object the legiſlature had in view, was, to take
off from the Roman Catholics that weight and influence, which
is naturally connected with landed property, beyond what per-

1776. FOONE *versus* BLOUNT. sonal estate can give. Therefore, where lands descend to a Roman Catholic, he loses the pernancy of the profits. They are also incapacitated from taking real estate by *purchase*, which, it is now settled, comprehends every mode of acquiring property in the legal acceptation of the word: by devise, *&c. &c.*

The only case that has been cited, is that of *Roper* versus *Radcliffe*. But that case, it is admitted by Serjeant *Glynn*, is not parallel to the present. If it were, being a decision of the House of Lords, we must have been bound by it; though the judgment was against great opinions, and not with the approbation of the bar. But though it must govern parallel cases, yet being so little satisfactory, it ought not to be carried further. That case came on first before Lord *Harcourt*, who ordered a case to be made for the opinion of the judges. Lord *Harcourt*, Lord *Trevor*, Mr. Justice *Powell*, and the Master of the Rolls, were all clearly of opinion, that the devisees might take the estates *as money:* First, upon a general principle of law, that if land is to be *sold*, and converted into money, it is not within the reason and policy of the Roman Catholic laws. Secondly, upon the doctrine and principles of the courts of *Equity*, which consider that which *is to be* done, as if it *was* done; namely, *land* directed to be *sold*, as *money:* And *money* directed to be laid out in the *purchase* of *lands* and settled in fee, as *land:* In the latter case though it remain in money, and though on the credit of it a debt is contracted, yet it shall go to the heir, and a simple contract creditor shall not be paid out of it. It was so settled by Lord *Hardwicke* in the case of *Trelawney* versus *Booth* *.

* 2 *Atk.* 307.

In the case of *Roper* versus *Radcliffe*, Lord Chief Justice *Parker* differed in opinion from the rest of the judges. His argument is very able, but I cannot say convincing to me. He says, "If such a devise be not within the act, the devisee might make "his election to pay off the debts, and keep the land; by which "means the provision of the statute would be evaded:" And he instances a variety of cases in which a devisee is entitled to make such election. And it certainly is so. But the defect of the argument lies here, and the objection may be answered thus: No, a Roman Catholic shall not make his election; because there is a law, which says, that being a Papist he *shall not* take the *land:* And, therefore, a court of *Equity* would decree, that he should take it as *money*. Something like it was said in the case of *Bowes* versus Lord *Shrewsbury* †.

† *Vide* this case in *Brown*'s *Parl. Cases*, *vol.* 5. 269.

In

FOONE *versus* BLOUNT.

In common cases, where money is given to a charity to be laid out in land or government security, though a common person in a like case may elect to have the land, the charity cannot; because it is unlawful: and therefore though the election be given, yet one alternative being lawful, and the other not, a court of equity says, you shall do that which is lawful.

In the marginal note in *Bacon's Abridgment. vol.* 3. 796. title *Papists*; and which is supposed to be taken from Lord Chief Baron *Gilbert*'s notes, it is said, that "where *lands* are *devised* to, or "vested in trustees *to be sold* for payment of particular sums to several people, some of whom happen to be Papists, that this "act does not prevent such Papists from taking the particular "sums or legacies intended for them; because they cannot insist "upon paying off the other incumbrances, and holding the estate, as a person can do, to whom the *residue* of the purchase money is devised." That goes a great deal further than this case; for a legacy charged upon land is very different from a mere power to sell. But I cannot see a doubt in this case: This is only a power to the executors to sell. What is the claim of the creditors? To be paid out of legal assets. The creditor has no interest in the land. He can have no claim upon the land; nor make his election to pay off the incumbrances and keep the land. He can have nothing till the land is turned into money. Here it is turned into money. If the executors had refused to sell the land, he could only have obliged the executors to sell: and till sold he has no interest whatever. Suppose a man dies and leaves a number of leases for years: A Popish creditor cannot take a lease for years, any more than he can a fee-simple. But can there be a doubt that he would have a claim upon such lease as assets?

No precedent has been produced against the claim of the creditors in this case. I should expect a precedent before I decided that a creditor should not be paid out of the assets, only because he happens to be of a different way of thinking from the established mode of religion. Therefore I am clear that this debt ought to be paid out of the assets arising from the sale of these estates.]

Mr. Justice *Aston* and Mr. Justice *Ashhurst* concurred.

Afterwards the court certified in these words. "Having "heard counsel and considered this case, we are of opinion that "a creditor, who is a Papist, is entitled to receive his debt out of "the money which has arisen by the sale of the testatrix's real "estate, according to the appointment by her will."

Same day.

SMITH *et al.* Assignees of HAGUE, *versus* DE SILVA *et al.*

One of three partners in a ship and cargo, the cost and outfit of which was 4568*l.* pays only 410*l.* in part of his *third* share, and gives his notes for the remainder; but, before, they become due, is declared a bankrupt. The *other partners* cannot, by *voluntarily* discharging the notes, stand in his place for any share of the profits. But the assignees are entitled to a *full third* both of the profits of the adventure, and of the value of the ship.

THIS was an issue out of the court of *Chancery*, to try whether the plaintiffs, as assignees of *Edward Hague*, a bankrupt, were entitled to *one third* part of the profits of the adventure of the ship *Unanimity*, from *London* to *Africa*, from *Africa* to *Jamaica*, and from thence to *London*, and also of the sale of the ship.

This cause came on to be tried at *Guildhall*, *London*, at the Sittings after *Easter* Term 1776, before Lord *Mansfield*, when the jury found a verdict for the plaintiffs, damages one shilling, and costs forty shillings, subject to the opinion of the court upon the following case:

That in *December* 1771, *Edward Hague* the bankrupt, together with the defendants *Isaac Bernal* and *Abraham Lara*, agreed to purchase and fit out a ship for the slave trade, at their *joint* expence, and for their *joint account* and risk in *thirds*: And that the other defendant, *De Silva*, should have the conduct and management of fitting out the ship as a purser or ship's husband, for the benefit of the parties concerned. That *Hague*, in *December* 1771, purchased the ship in question for 680*l.* and soon after gave a bill of sale of one third part to the defendant *Bernal*, and to the defendant *Lara*, a bill of sale of one other third part; that soon afterwards the defendant *Lara* sold one moiety, or half part of his third part, to the other defendant *De Silva*. That *De Silva* was at the whole expence of fitting out the ship for sea, and supplying her cargo, &c. amounting to the sum of 4658*l.* 15*s.* 1*d.* of which, the defendants *Lara* and *Bernal* duly paid him their respective proportions: But *Hague* paid only 410*l.* 11*s.* 7*d.* in cash, and gave two promissory notes, one for 403*l.* 4*s.* 5*d.* payable at six months, the other for 739*l.* 2*s.* 4*d.* at twelve months for the remainder. That *De Silva* paid in ready money towards the expence of the outfit, the sum of 1,331*l.* 14*s.* 9*d.* only; and that he had six months credit for 1,209*l.* 13*s.* 3*d.* part of the outfit and cargo thereof, and twelve months credit for the remaining 2,217*l.* 7*s.* 1*d.* from the 1st of *January* 1772. That the said ship sailed for *Gravesend*, on or about the first of *March* 1772, and arrived safe, &c. That before the promissory notes so given by the bankrupt

became

became due and payable, and likewise long before the ship arrived at *Jamaica*, *viz*. on the second day of *July* 1772, *Hague* was declared a bankrupt. It could not be known for seven or eight months after, whether the ship would make a profitable voyage or not. The plaintiff *Nutt*, one of the assignees, applied several times to the defendant *De Silva* to take the bankrupt's share or interest in the said ship, and the profits and risk thereof to himself; and to pay the plaintiffs the said sum of 410 *l.* 11 *s.* 7 *d.* being the money the bankrupt had actually paid on account thereof, which the defendant *De Silva* at first refused: but endeavoured all he could to sell the bankrupt's share in the ship, and the outfit and profits thereof to some other person, who would pay the 410 *l.* 11 *s.* 7 *d.* to the plaintiffs, his assignees, and to pay for the remainder of the outfit thereof: but not being able so to do, the defendants *Bernal* and *Lara*, about a month or two *after the bankruptcy of Hague*, were, after much intreaty, prevailed upon by the defendant *De Silva*, to join with him to take the remainder of the bankrupt's share, equally between them, and to pay the said 1,142 *l.* 6 *s.* 9 *d.* between them in equal proportions, being the remainder of the money the bankrupt had agreed to pay towards the share thereof he had proposed to take. The defendant *Bernal* accordingly paid the defendant *De Silva* one third part of the said sum of 1,142 *l.* 6 *s.* 9 *d.* and the defendant *Lara* paid him the other third part thereof; and the defendants, from that time, considered the plaintiffs (the assignees) as interested in the share of the ship, so to have been taken and paid by the bankrupt, only as the sum of 410 *l.* 11 *s.* 7 *d.* was to the sum of 4,658 *l.* 15 *s.* 1 *d.* the amount of the costs and outfit of the said ship and cargo: And that the defendants were entitled to the remaining part of the share the bankrupt had originally proposed to take. That the plaintiff *Nutt* pressed the defendant *De Silva* several times to pay the said 410 *l.* 11 *s.* 7 *d.* and to take the same to himself, with the profits and risk thereof.—That the first intelligence the defendant had of the ship having made a profitable voyage, was on the 24th *February* 1773. The question was, Whether the assignees, as standing in the place of *Hague*, the bankrupt, were entitled to one third, or to what other share of the profits of the adventure?

Mr. *Mansfield* for the plaintiffs: Mr. *Dunning* for the defendants.

Lord *Mansfield*, after stating the case, proceeded thus: The adventure having proved a profitable one, the question is, what

1776.

SMITH *versus* DE SILVA.

ſhare the aſſignees of *Hague* are entitled to: Whether they are entitled to *one third* of the profits, and of the money ariſing from the ſale of the ſhip, or only to the proportion which the ſum of 410 *l.* paid in money by *Hague* towards the expence of fitting out the ſhip, *&c.* bears to the whole amount of ſuch original expence which was 4,658 *l.*? There is no difference between the rule which muſt govern the determination of this caſe in a court of law or equity. It depends upon the right of the bankrupt: And to find out what the right of the bankrupt is, it will be neceſſary to conſider *firſt*, how it ſtood at the time of the bankruptcy; and *ſecondly*, whether any alteration has happened ſince to vary ſuch right. *Firſt*, at the time of the bankruptcy, the whole expence was incurred. *Hague* was liable to *De Silva* for the amount of the notes, and a partner in thirds: The adventure was then at ſea, and *De Silva*, as purſer or huſband of the ſhip, was liable to him for the amount of his third ſhare of the profits whatever they might be. But ſuppoſe the other partners were liable to thoſe who truſted *De Silva*; the conſequence on a bankruptcy between partners is, that they are entitled as againſt each other to the balance of accounts; and ſo it was ſettled in the caſe of *Skipp* verſus *Harwood*, before Lord *Hardwicke*, in *Chancery**. Therefore, if the other partners had been obliged to diſcharge the amount of the notes which remained unpaid at the time of the bankruptcy, the aſſignees muſt have allowed the other partners the full ſum paid for the bankrupt, and could have come againſt them only for the balance due to him, if any. This is not the caſe of a *new* trading, or of a new adventure begun *after* an act of bankruptcy. In *that* caſe, it is fair to ſay, that the bankruptcy diſſolved the partnerſhip: But here, all the expence was incurred prior to the bankruptcy; and if the bankrupt by an acceſſion of fortune had had ſufficient, and the voyage had proved a loſing one, he would have been liable for the whole in proportion with the other owners. Therefore, he had clearly a right to a third of the profits at the time of the bankruptcy; and the inſolvency of the bankrupt does not vary his right. *Secondly*, there has been nothing done ſince which can make the leaſt variation: For every thing that has been done, was done without the privity of the bankrupt or of the aſſignees. Conſequently, their right cannot be varied by an agreement between other perſons, in which they were not concerned. It is immaterial whether *De Silva* pledged his own credit only to the tradeſmen, and took the ſeparate credit of the partners for the

* 1 *Vez.* 239. *et vide* Fox *verſus* Hanbury, *ſupra*, 445.

ſhare

share of each; or whether the other partners were liable to the tradesmen for the whole. The question is, What was the right of the bankrupt? If the other partners were not liable to *De Silva* for his share, yet the bankrupt, upon paying the full amount of his share, was entitled to a third of the profits, as he would have been liable to a third of the loss, if the adventure had been unprofitable. When I say upon payment in full, I mean payment according to law. If he had not become bankrupt, it must have been an actual payment of the whole of his share. But as he is become bankrupt, it must now be a payment according to the distribution made by law in that case; which is, a proportionable dividend with the rest of the creditors. Therefore, whether it were a profitable or a losing adventure, cannot vary the right. The consequence is, that the assignees are entitled to one third of the ship and adventure in question.

1776.

SMITH *versus* DE SILVA.

Aston and *Ashhurst* Justices, declared themselves to be of the same opinion.

Per cur. Let it be indorsed on the *Postea*, that the assignees of the bankrupt are entitled to one third of the value of the ship, and of the profits of the adventure in question.

N. B. I attended the argument of this case in *Chancery*, when Lord *Apsley* directed the issue. His Lordship said, "he was extremely clear that the assignees were entitled to a third of the profits of the adventure, and of the money to arise by the sale of the ship: That he considered it as one risk; and till the risk was over, the account of debtor and creditor could not be settled. But as it was a question of law, for the satisfaction of the parties, he would direct an issue."

*** Mr. Justice *Willes* was absent at the decision of the several cases included in this term.

THE END OF TRINITY TERM.

1776. Badkin *versus* Powell.

guilty of an imprisonment; and therefore must justify. But here it comes out on the plaintiff's own shewing, that the pound-keeper had nothing to do with the taking. The law thinks him so indifferent a person, that if the pound is broken, the pound-keeper cannot bring an action, but it must be brought by the party interested. It would be attended with terrible inconveniencies, if he were answerable for a wrongful taking by the persons who bring the cattle to him; and, therefore, I am clearly of opinion there ought to be judgment for the defendant *Chancellor* in this case.

Aston Justice.—I am of the same opinion. The defendant is no trespasser, and therefore was not obliged to justify. In 2 *Jones* 214. there is a very sensible case, which determines, that if an officer do not intermeddle, but only does what belongs to his office, he shall not be liable to any precedent tortious act of which he could know nothing. A gaoler must justify, because a prisoner cannot be delivered to him without a warrant. Therefore he must state the warrant. But a pound-keeper has nothing to do with the taking, he has only to put the cattle, &c. into the pound; the instant they are in the pound, they are in the custody of the law; and if the pound is broken, he cannot bring an action but the person who distrained them: And so it is expresly laid down in *Fitz. Nat. Brev.* tit. *de parco fracto*, 228. *Quarto* edition 1775.

Here the defendant *Chancellor* only did the duty of his office, by impounding the cart and horses brought to him by the other defendants. The cases, where a party concerned in any subsequent stage of the business is held liable to an action, are, where he renders himself so by *assenting* to the *original trespass*. But here is no assent to the trespass. Therefore, I am clearly of opinion he ought to have judgment.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst* concurred.

Per Cur. Judgment for the defendant *Chancellor*.

Moore *versus* Mourgue.

UPON shewing cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows:

This was an action brought by the plaintiff, who is a merchant at *Alicant*, against the defendant, his agent in *London*, for misbehaviour in not insuring the plaintiff's goods agreeable to his directions. The goods were a cargo of fruit; and by the letters produced in evidence,

evidence it did not appear that the plaintiff had given the defendant any particular directions how or with whom to insure; but only generally, to insure the cargo. The defendant insured with the *London Insurance-office*, who, in policies upon fruit, always put in an exception, free from *particular average*. This policy was made therefore, with that exception. The loss was not entirely a total loss; for though the goods were at first under water, some were saved. But those that were damaged would not pay the salvage of them. The jury found a verdict for the defendant: And one of them said the ground of their verdict was, because they thought he had acted *bonâ fide* to the best of his judgment.

Mr. *Dunning* in support of the rule, insisted, that though the commission in this case was to insure generally, and no particular directions given; yet it behoved the defendant to discharge it in such manner as would effectually answer the end proposed. That the very nature of the commodity shewed it was liable to an average loss, therefore the defendant should have guarded against that danger: And there being two offices where this exception is never put in, it was gross negligence in the defendant not to insure with them. Therefore, he prayed a new trial might be granted.

Lord MANSFIELD.—The drawer of this declaration has thought it necessary to invent two grounds of action upon which to found the plaintiff's claim. 1*st*, That the plaintiff had given orders to insure free of average, except general, or the ship stranded; and that the defendant had undertaken to do so. The next ground is, that he had given orders to insure in the usual and customary course. These two grounds are entirely a fiction, for there were no such orders given, and no such express undertaking: And to maintain this action, the defendant must be guilty either of a breach of orders, gross negligence, or fraud. Now all the observations which have been made to-day, were made at the trial; and were very proper for the consideration of the jury; and my direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malâ fide*, they should find for the plaintiff. If, on the contrary, they were of opinion that he had acted *bonâ fide* and to the best of his judgment, then they should find for the defendant. In delivering their verdict they say, 'they did not think the defendant guilty of gross negligence, or that he acted *malâ fide*.' The court therefore will not say so. The plaintiff, if he pleased, might have given

orders

1776.

Moore *versus* Mourgue.

orders to the defendant not to insure at the *London Insurance-office*; but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters. It seems, the *Exchange Assurance* and the *London Insurance-office* differ in the form of their policy. But though the one runs a risk which the other deos not, the premium is the same. There could be no temptation therefore to the defendant as to his choice between them. If, upon all the circumstances the jury had found for the plaintiff, it might have been a cast whether the court would have granted a new trial. *A fortiori*, in a hard action, where, as no particular orders were given, there has certainly been no breach of orders; where the defendant appears to have acted *bonâ fide*, and where the plaintiff has himself been guilty of the first omission in giving no directions at all, there seems to be no ground for the court to interpose against the defendant. Therefore, I am of opinion the verdict ought to stand.

The three other judges concurred.

Per Cur. Rule for a new trial discharged.

Tuesday, Nov. 19th.

SALISBURY *ex dim.* COOKE *versus* HURD.

A lease for years by a copyholder with the licence of the Lord, where the widow by custom would be entitled to her free-bench if the copyholder had died seised, defeats the widow of her free-bench.

IN ejectment for certain copyhold lands, in the manor of *Warminster* in the parish of St. *Cuthbert*, *Wells*; the judge, at the trial directed the jury to find a verdict for the defendant; but gave the plaintiff liberty to move the court to set the verdict aside, and to enter up a verdict for himself in its stead, if the court should be of opinion with him.

Upon shewing cause against a rule obtained by the plaintiff as above, the case, by the report, appeared to be as follows: That the custom of the said manor was to grant copyholds for three lives, that the first life had a power of surrendering the whole estate, and the widow of a tenant who died seised was entitled to her free bench. That on the 6th *September*, 1763, *F.* then copyholder for three lives, surrendered to *Hurd*, the deceased husband of the defendant; who, on the 19th of *October*, 1767, by *licence from the Lord*, demised to *Singer* for 99 years, by way of mortgage: Then *Hurd* died; and *Singer* assigned to the plaintiff. At the trial, only one instance of a lease by licence was given in evidence; whereupon it was insisted for the defend-

4 ant,

ant, the widow, that there being no special custom to let by lease, the only way of transferring the copyhold was by surrender: And therefore, in this case, if the estate of *Hurd* the husband was not determined according to the custom of the manor, he must be deemed to have died seised of the copyhold; and the widow still entitled to her free bench. The judge was of that opinion, and directed the jury to find for the defendant as above.

1776.
SAUNDERSON v. HURD.

Mr. *Kerby*, who shewed cause, insisted that copyhold estates could only be transferred by surrender and admittance. *Co. Cop. f.* 36. That there being no special custom to warrant this sort of mortgage, on the contrary only a single instance produced, the widow ought not to be defeated of her free bench: And the husband should have been content to pursue the ordinary mode of mortgage, by conditional surrender. Therefore he prayed the rule for setting aside the verdict might be discharged.

Mr. *Dunning* and Mr. *Gould contra*, contended, that the copyholder, having obtained the Lord's licence, might do what he pleased with the estate; and could have conveyed it from the wife in any form he thought fit: Consequently, her right of free bench must be subject to the mortgage in this case; and cited 1 *Rol. Abr.* 508. *Poph.* 105. *Hall* versus *Arrowsmith*.

Lord *Mansfield* being obliged to go to the House of Lords said, he was of opinion with Mr. *Gould*: And the rest of the court concurring with his Lordship, decided the case immediately; and held, there was a great difference between the custom of *free bench* found in this case, and the case of *Dower*. In the latter, the widow is entitled to dower of all her husband was seised of during the coverture: But here, her right was confined to such estate as he should *die seised* of; consequently, as between Lord and tenant, they might defeat the wife's estate when they pleased.

Per Cur. Rule absolute for the plaintiff to enter up judgment.

Mr. *Kerby* then referred the court to *Fareley's* case, *Cro. Jac.* 36. and *Freeman* 516. as in point for the plaintiff.

JENKINS *ex dim.* YATE *versus* CHURCH.

Wednesday, Nov 20th.

IN ejectment, upon shewing cause why a new trial should not be granted, the case appeared to be shortly this:

A lease, void against a remainder-man, cannot be set up by his acceptance of rent.

Tenant for life made a lease for 21 years; and, before the expiration of the term, died. The remainder-man in-tail suffered the

1776.

Jenkins *versus* Cavack.

the defendant to remain in possession four or five years, received rent regularly during that time, and then gave notice to quit, and brought this ejectment. The question was, Whether this acceptance of rent by the remainder-man amounted to a confirmation of the lease; or whether, the lease being void, it was incapable of confirmation?

Lord Mansfield.—This is a *void* lease and not voidable only. But if it were *merely voidable*, the acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation. It cannot be a confirmation unless done with a knowledge of the title at the time; or unless the remainder-man lies by and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant. But here it is a void lease; and in general a void lease is incapable of confirmation *. Therefore the rule must be discharged.

* *Vide supra*, 201 Goodright *versus* Straphan.

The three other judges concurred.

Per Cur. Rule for a new trial discharged.

Same day.

Harris *versus* Butterley *et al'*.

In trespass against *several*, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest. And it is matter for the jury, whether the trespass proved be the same as that confessed. But the plaintiff *cannot* be *nonsuited*.

Upon shewing cause why a new trial should not be granted in this case, *Ashhurst* Justice reported from Mr. Barron *Perryn* as follows:

This was an action of assault and false imprisonment, brought by the plaintiff against four defendants: *viz. Samuel Butterley, John Moore, Richard George*, and *Humphry Woolrich*. Two of the defendants, *viz. Butterley* and *Moore*, pleaded not guilty, on which issue was joined. The other two, *viz. George* and *Woolrich*, severally suffered judgment to go against them by default. At the trial, *Thomas Tranter*, on the part of the plaintiff, swore he saw the plaintiff in company with *Butterley* and *Moore*, *no other person* being then with them, and they were taking the plaintiff gently down to the gaol. That when they came to the goal, *Butterley* put the plaintiff in the dungeon, and Mrs. *George*, the wife of the defendant *George*, locked him in. But that he never saw the defendant *George* or *Woolrich*, during the whole time. The next witness swore the defendant *Woolrich* had acknowledged to him, he was with *Butterley* and *Moore* when they took the plaintiff to gaol. And there the plaintiff rested his case. The counsel for the defendants called no witness; But insisted, that as the assault and imprisonment were laid, it was incumbent

cumbent on the plaintiff to prove a *joint* assault and imprisonment by *all* the defendants. That although the confession of the defendant *Woolrich* might be sufficient to affect himself, yet it was not evidence against the other defendants; and that there was no evidence against the defendant *George*. On the other side it was contended, that the confession of the defendant *Woolrich* was sufficient against all the defendants; and that the acts of Mrs. *George* would charge the defendant *George* her husband.

Upon the whole, I was of opinion, the evidence was not sufficient to support the declaration; especially as the witness *Tranter* was present at the gaol, and did not see the defendant *Woolrich* there: And I was going to sum up the evidence and to have delivered that opinion to the jury, and to have taken their verdict. But having intimated that opinion, the plaintiff's counsel called on the defendant's counsel to ask for a nonsuit; which he declining, the plaintiff's counsel desired the plaintiff might be called; which was thereupon accordingly done, and a nonsuit entered.

Mr. *Bearcroft*, who shewed cause, said, he was ready to admit, that where trespass is brought against *four*, and *two* suffer judgment by *default*, it was the same with respect to those two as if the trespass had actually been proved against them. But he insisted, that to make it a *joint* trespass, the plaintiff ought to prove a trespass by the other two jointly with those who let judgment go by default; and cited 2 *Salk.* 455. *Lover* v. *Salkeld*, where it was said, "A *non-pros* might be entered "after interlocutory judgment, as well as before." *Secondly*, Supposing the nonsuit was wrong, it was obtained by a trick, and at the request of the plaintiff's counsel; and therefore prayed the rule might be discharged.—Mr. *Dunning*, *contra*, contended, that it was sufficient for the plaintiff to prove his case against the two defendants, who denied the trespass, without connecting them with the other two, who had suffered judgment by default. The latter certainly admit the trespass: all that remains, therefore, is, for the plaintiff to prove it upon the other two; and that being fully done in this case, the nonsuit was clearly wrong, and ought to be set aside.

Lord MANSFIELD.—This is an exceedingly plain case. As to any art, *that* is to be laid entirely out of the question. It has been often laid down, that if a judge gives it as his opinion that the plaintiff should be nonsuited, and counsel submit to his direction, it is not to be imputed as a fault of the counsel.

1776.
— —
HARRIS *versus* BUTTERLEY.

It is impossible for the plaintiff to be nonsuited in this case; for there cannot be a nonsuit against him in respect of those who suffered judgment by default.

Secondly, The evidence given was most clearly proper evidence to be left to the jury: For the plaintiff need only bring evidence to affect those who have pleaded not guilty, and denied the charge. If there had been evidence to satisfy the jury that they were quite different trespasses, that would have been matter for the jury to give their opinion upon. The two who let judgment go by default, admit the trespass charged in the declaration. Then in all events it is a matter of fact to be left to the jury, whether the assault proved to have been committed by the two who pleaded, was the same assault as that which stands confessed on the record by those who let judgment go by default, or a different one. Here one of the defendants, who suffered judgment to go by default, was the gaoler, to whom the defendants, who pleaded not guilty, delivered the plaintiff. Upon these circumstances, the court is under a necessity to set the nonsuit aside, because it is a matter that has not been tried.

Aston, *Willes*, and *Ashhurst*, Justices, concurred.

Per Cur. Rule for a new trial absolute, and the nonsuit set aside without costs.

Friday, *Nov.* 22d.

RATCLIFFE *versus* EDEN, *et al.*

If persons, riotously assembled, demolish the doors and windows of a house, and having thus riotously obtained an entrance into the house, destroy the goods and furniture in it, the *hundred* are answerable in an action on the stat. 1 *Geo.* 1. *st.* 2. c. 5. *sect.* 6. for the damage done to the furniture as well as to the house.

THIS was an action on the case, on the stat. 1 *Geo.* 1. *st.* 1. *c.* 5. *sect.* 6. against the hundred of *West Derby*, in the county of *Lancaster*, for damages done to the plaintiff's house and furniture by rioters. The declaration consisted of two counts. *First*, That more than twelve persons riotously assembled themselves and *demolished* the plaintiff's *dwelling house in part*. *Secondly*, For demolishing part of a certain other dwelling house of the plaintiff's, together with the *goods* and *chattels* of the plaintiff then and there being *in the dwelling house*, and wherewith the said dwelling-house was furnished. The defendants pleaded not guilty; upon which issue was joined. Before the trial came on, the attornies for the plaintiff and defendants entered into the following agreement, which was afterwards made a rule of court. "That a verdict should pass against the defendants on the first "count, for the sum of 38 *l.* 8 *s.* 9 *d.* being the amount of the "damages sustained by the plaintiff, by the *demolishing in part*

"*his*

"*his dwelling-house*: And on the 2d count for the sum of 128 *l.* 1776.
"18 s. 11 *d.* being the amount of the damages sustained by him
"in the *demolition* and loss of sundry *goods* and *furniture*, his RATCLIFF *versus* EDEN.
"property, *then and there destroyed* by the said rioters, subject to
"the opinion of the court on the following case."

"The plaintiff was a joiner in the town of *Liverpool*, but had "lately been concerned in the *African* trade. In *August*, 1775, "some sailors in the town of *Liverpool* caused a great riot, and "the plaintiff being very active in attempting to suppress it, the "rioters threatened to attack his house. But he having intimation of their intention, secured his doors and window-shutters "in the best manner he was able. However, the rioters, armed "with different sorts of weapons, such as guns, cutlasses, and "bludgeons, determined to do all the mischief they could. And "on the 29th of that month, being assembled to the amount of "hundreds, amongst whom were 50 or 60 sailors, armed in "manner aforesaid, *broke open the window-shutters, forced the* "*door*, and *demolished a great part of the dwelling-house* of the "plaintiff, to the amount, upon a moderate computation, of "38 *l.* 8 *s* 9 *d.* And *having in this riotous manner obtained an* "*entrance* into the house, they *destroyed the furniture* and household goods of the plaintiff to the amount of 128 *l.* 18 *s.* 11 *d.* "upon a moderate computation."—It is alleged on the part of the plaintiff, that the damage to the furniture was *consequential* to the demolition of the house in part as above stated.—On the part of the defendants it is alleged, that the damage done to the goods and furniture is a *substantive* and *separate* injury, and not provided for by the statute 1 *Geo.* 1. *c.* 5. *sect.* 6.

Mr. *Wood* for the plaintiff stated the questions to be two. 1st. Whether the plaintiff was entitled to recover damages for the destruction of the furniture? 2dly. Whether he was entitled to costs? and he was proceeding to argue, but Lord *Mansfield* called on the counsel for the defendants to go on.

Mr. *Wilson* for the defendants admitted the plaintiff was entitled on the 1st count; the facts found, clearly amounting to a demolition of the house in part. As to the 2d count, he stated the question to be, Whether destroying the furniture was demolishing the house in the whole or in part, within the meaning of the statute; and he insisted it was not. Before the statute, no action whatsoever could be maintained against the hundred in respect of the mischief which the statute has now provided. That mischief is in terms described by the act, and confined

1776. the *particular* case of *riotously demolishing or pulling down* a house in whole or in part. But no mention is made of the destruction of furniture; nor was it at all in contemplation of the legislature at the time. It is not a necessary consequence of the house being pulled down, but a separate independent act. To prove that an action will lie in this case, it must be shewn that the hundred would have been liable, if the furniture alone had been destroyed, and no damage whatsoever done to the house. For instance—Suppose the rioters had entered, the door being open, and then demolished the furniture only. That clearly would not have been within the act. Therefore this case is neither within the words or meaning of the act. This appears further from the provision in the statute* relative to the pulling down a church or conventicle; in which case the statute makes the hundred liable, and directs the damages recovered to be applied towards rebuilding the church. Suppose the chalices, &c. are destroyed; can this provision be extended to replacing them or any other part of the furniture of the church? Certainly not. Acts of parliament of this kind have not been so beneficial as it was supposed they would be, and in general have been afterwards restricted. The statute of *Winton*, 13 *Ed.* 1. *st.* 2. *c.* 2. which gives an action against the hundred generally if the party is robbed, is not extended but restrained by the stat. 27 *Eliz. c.* 13: And in construction too it has always been restrained. Another circumstance which shews that this act ought not to be extended by construction, is the provision which the legislature has thought fit to make by the stat. 9 *Geo.* 1. *c.* 22. in case a house is burnt. A person who had burnt a house would not have been within this act of parliament. Again: This act of parliament appears by the preamble to have been made on a particular occasion; which no longer exists. It would be hard therefore to make one set of men liable for the delinquency of another, by construction or implication. For these reasons he submitted the defendants were entitled to judgment on the first question.

RATCLIFFE *versus* EDEN.

* Sect. 6.

Mr. *Wilson* was about to proceed to the second question; but Lord *Mansfield* said, The general principle is decided, that the party grieved is always entitled to costs; as in an action for a false return of a member of parliament, and in many other cases that might be put.

Mr. Justice *Aston.*—This is a remedial, not a penal law, and so is the statute of *Winton*, 13 *Ed.* 1. Here the plaintiff is the party grieved: Therefore clearly entitled to costs.

Lord MANSFIELD.—I can see no doubt on this question:—These riots are not only injurious to individuals, but dangerous to the state: And though the particular circumstances of the time gave rise to the act, yet they gave rise at the same instant to a general law to continue in force after the particular occasion itself had ceased.

What is the provision made by the statute, if an outrage like the present is done by an armed force assembled together to the number of twelve? It alters the nature of the offence. It was before only a trespass, but being done by an armed force, the legislature thought the consequences so dangerous, that they have enacted it shall be felony, and have made it capital.

If the act had never been made, the trespassers would have been liable to answer for the *whole* injury in damages. To encourage people to resist persons thus riotously assembled, and to reward those, who, by doing their duty, shall have incurred their resentment, the same law has made a further provision, that as the trespassers are to be hanged, the country shall pay the damages: And this, by way of inducement to the inhabitants to be active in suppressing such riots, which it is their duty to do; and which being thus made their interest too, they are more likely to execute. This is the great principle of the law, that the inhabitants shall be in the nature of sureties for one another. It is a very ancient principle; as old as the institution of the decennaries by *Alfred*, whereby the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. The same principle obtains in the statutes of hue and cry. It is the principle here. The statute says, the hundred shall be answerable in damages, occasioned by such demolishing, or beginning to pull down and demolish. What is the case here? The *whole* is *one* act. The mob force in at the doors and windows, and by one continued act destroy part of the house and many of the goods. There is no distance in point of time, but it is one continued act without intermission. What was the jury to do? To estimate the damage occasioned by the act. If a witness had given evidence that he had seen a person taking down the glasses, *&c.* would not that have been evidence of such person being a party concerned in pulling down the house? By the destruction of the furniture the damages sustained are of a larger amount; but the hundred is equally liable. It would be a very critical distinction indeed to say, that where a house is pulled down it is no part of the damages sustained to pull down the glasses, *&c.*; Or if a church is

 demolished

1776.

RATCLIFFE *versus* EDEN.

demolished, to pull down the pulpit. It is going on a verbal adherence to the words, without regard to the meaning. If there had been any distance of time, or if the goods had been carried out of the house and then destroyed, it might have been a different thing, because that would have been a *distinct* act. But there is no drawing the line in this case, between actually demolishing the house and destroying the furniture. It comes therefore very near the case of pulling down the whole house and thereby crushing the furniture.

ASTON, Justice.—The object and principle of this act was, to transfer the damages occasioned by the trespass, from the rioters to the hundred; to make it felony in the offenders themselves, and to put the party injured in the same state as before. It is a remedial law, and ought to be extended.

ASHHURST, Justice. If the house had been burnt, there could have been no doubt; and here it was all one continued act: Therefore the hundred is liable for the damage done to the goods, as well as for that which was done to the house.

Lord MANSFIELD.—I see in the case it is stated as if this were a *consequential* damage. But it is not: It is the very act. If the rioters had broke down the doors and demolished the windows and left the house, and afterwards somebody had come in and destroyed the furniture, there it would have been consequential damage. But I consider this as *one continued* act, and the same as if the goods had been destroyed by pulling down the house.

Per Cur. Postea to be delivered to the plaintiff.

Saturday, Nov 23d.

SYMMERS *et al. versus* REGEM, in Error.

One information *only*, may, by leave of the court, be exhibited under the *Irish* statute 19 *Geo* 2, c. 2. *sect* 4 against *different* persons, and against the *same* person, for usurping *different* franchises: And there is no necessity to state such leave upon the record.

THIS was a writ of error from a judgment of the court of *King's Bench* in *Ireland*, in *quo warranto*, against *Alexander Symmers*, *James Brown*, *George Staunton*, *Franklin Kirby*, *Abraham Marshall*, and *Thomas Grubb*; to shew by what authority they claimed to exercise the privileges and franchises of *freemen*, *free burgesses*, and *common councilmen* of the town and borough of *Galway*.

The information set forth, that the borough of *Galway* is a town and borough incorporated by the name of the mayor, sheriffs, free burgesses, and commonalty of the town and county of the town of *Galway*, and that a common council is a constituent part of the said corporation. That the mayor, sheriffs, re-

corder,

corder, town clerk, and all other officers of the said town of *Galway*, are to be elected and chosen only by the *mayor*, *sheriffs*, and *common council* of the said town. And that the six defendants have used and exercised the franchises of freemen, free burgesses, and common councilmen, without any lawful authority whatsoever. 1776. SYMMERS *versus* REGEM.

Plea. The defendants by way of plea set forth, that the town and borough of *Galway* is, and from time immemorial hath been, an ancient town and borough; and that the mayor, sheriffs, free burgesses, and commonalty thereof, at the time of granting of the letters patent herein after mentioned, was a body corporate in deed, fact, and name, and that from time immemorial there was and yet is a *commonalty* consisting of an indefinite number of freemen; and also an indefinite number of free burgesses; and also a common council, consisting of an indefinite number of members duly elected, admitted, and sworn into the places or offices of common councilmen. That the sheriffs for the time being have been members of the said common council, and also of a tholsell or general assembly of the said town; and say, that the mayor, sheriffs, recorder, town clerk, and all other officers of the said town of *Galway*, have been, and are for the future to be elected and chosen only by the mayor, sheriffs, and common council present, on the days whereon such elections were usually made.

That from time immemorial the custom hath been, that the *mayor* or other the chief officer and *common council* of the said town for the time being, or *the greatest number* of the *said common council present*, did and might, being duly assembled from time to time, *elect* such other discreet persons, not disqualified by any law in being, *members* of the said *common council*. That from time immemorial the *electing* of any *person* or persons to be *freemen* or free burgesses, shall be by the said *tholsell* or *general assembly*. That by certain rules, orders, and directions made and established by the Lord Lieutenant and council of the realm of *Ireland*, on the 23d of *September* 1672, for the better regulating of the corporation of the town of *Galway*, and the electing of magistrates and officers there, in pursuance of the stat. 17 & 18 *Car.* 2. intitled "An act for the explaining of some doubts "arising upon an act, intitled an act for the better executing of "his majesty's gracious declaration, for the settlement of his "kingdom of *Ireland*, and satisfaction of the several interests "of adventurers, soldiers, and other his subjects there, and for "making

1776.

Symmers *versus* Regem.

"making some alterations of and additions unto the said act; "for the more speedy and effectual settlement of the said kingdom," it is directed," "that no person or persons, that shall be "elected either mayor, recorder, sheriff, treasurer, alderman, "town clerk, or one of the common council, shall be capable of holding, *&c.* until he or they shall have taken the *oath* "of *supremacy* therein mentioned, and the *oath* of *allegiance*, "besides the oaths usually taken upon the admission, *&c.* and "also an oath in the said rules prescribed, commonly called the "little oath. That *no matter* or thing in any wise relating "to the affairs of the said town, shall be *propounded* or debated "in the *Tholsell*, or any general assembly of the said town, "*until* the same shall have *first passed* the *common council* of "the said town." And it is further ordered, "That all "foreigners, strangers, and aliens, as well others as Protestants, "who are or shall be merchants, traders, artizans, artificers, seamen, or otherwise skilled in any mystery, craft, or trade, who "were then *residing* and inhabiting within the said town of "*Galway*, or who should at any time hereafter come into the "said town of *Galway*, with *intent* and resolution to *inhabit* and *reside*, upon payment down or tender of 20*s.* "by way of *fine*, unto the chief magistrate or magistrates, "and common council, or other persons authorised to admit "and make freemen, be admitted freemen *during his* or their "*residence* for the most part, and no *longer*." That King *Charles* the 2d, by his letters patent the 14th of *August*, in the 29th year of his reign, did grant, "That the said town of *Galway*, and all castles lying within the space of two miles from "every part of the said town of *Galway*, be one entire county "of itself: And that there should be for ever thereafter, one "new body corporate and politic in deed and name, consisting "of one mayor, two sheriffs, and free burgesses, and commonalty, "by the name of the mayor, sheriffs, free burgesses, and commonalty of the said town and county of the town of *Galway*;" And did thereby make certain persons particularly named in the said letters patent, to be free burgesses: And grant, "that "the said persons so particularly named, and made free burgesses, "as also their successors, and likewise all and every such person, "and persons as should be of the common council of the said "town, *before* they be *admitted* into their respective offices, "places or employments, *should take* as well the said herein "before mentioned *oaths of supremacy and allegiance*, and the

"oath

"oath commonly called the *little oath*, and also the *oaths there-* 1776.
"*tofore usually* taken, for the due execution of the said places
"and offices; the *said several oaths* to be *administered* by the SYMMERS
"*mayor*, or recorder, and *two of the free burgesses* of the said *versus*
"town:" which letters patent the then mayor, sheriffs, bur- REGEM.
gesses, and commonalty accepted of.—That by an act of parliament made in the 4th year of the reign of *George* 1st, intitled "an act for the better regulating the town of *Galway*, and "for the strengthening the Protestant interest therein," it is enacted "that no person shall be *elected mayor* or sheriffs, or com-"mon councilmen, who shall not be an *inhabitant* or inhabitants "within the said town and liberties thereof, at the time of being "elected into any of the said offices, respectively; and that hath "or have not been resident for the space of one whole year before "such election; and that *all* persons who profess themselves of "any *trade*, mystery, or handicraft, that do or shall come to "*reside* in the said town of *Galway*, in order to follow their re-"spective trades, *shall and are hereby declared to be free* of the said "town and corporation, and also of that company or corpora-"tion to which their respective trades belong, *without paying any* "*thing for such freedom*; and shall continue freemen of such "company or corporation *as long as they dwell* in the said town, "and *no longer*: PROVIDED, that no persons are to have the "benefit of their freedoms as aforesaid, unless they have been "professed *Protestants* for *seven* years, or upwards, next *before* "their *demanding* their *freedoms*, pursuant to this act; and shall "also take the usual *oaths* of *freemen*; and also the *oaths of al-*"*legiance, and supremacy, and abjuration*; and make and subscribe "the *declaration against transubstantiation*, *before the mayor* of "the town, who is required to administer the same."

The plea then set forth that *Symmers*, *Brown*, and *Staunton*, were, on the 22d of *November* 1771, *duly elected* freemen and free burgesses, their election and admission having first passed the common council and been propounded in the *Tholsell*.—The defendants *Marshall* and *Grubb* setting forth that they were *tradesmen*, *Protestants for seven years*, and *residents* within the town, further pleaded, that on the 4th of *February* 1772, an assembly or meeting of the mayor and common council was in due manner holden at the *Tholsell*, and that they then and there *offered to take the oaths* of allegiance, supremacy, and abjuration, and *demanded* from the mayor of the said corporation and the *common council* there assembled their freedom, pursuant to the said last

mentioned

1776. mentioned act of the 4 *Geo.* 1: And thereupon the *electing and admitting* them the said *Abraham Marshall* and *Thomas Grubb* to be freemen of the said town &c. *passed the said common council.* That afterwards, to wit, the 5th day of *February* 1772, a *tholsell* or general assembly was in due manner held at the *Tholsell*, and then and there the *electing and admitting* them the said *Abraham Marshall* and *Thomas Grubb* to be freemen was *propounded*, and they were *then and there* in *due manner elected* by the said *tholsell, freemen* of the said town and corporation. *All* the defendants further pleaded, that they were in due manner elected into the respective offices of free burgesses and common councilmen, and that being so elected into the offices of freemen, free burgesses and common councilmen, they did, before they were admitted, take the oaths of allegiance, supremacy and abjuration, &c. and all the oaths usually taken, &c. before the *mayor* and *two free burgesses*.—The *replication* took issue that the defendants were "*not elected* in *manner and form* aforesaid "into the offices of *freemen*, free burgesses, and common council-"men respectively." And at the trial all the issues were found for the Crown.

SYMMERS *versus* REGEM.

The defendants, in support of their title, gave in evidence the corporation books, in which were contained entries of their respective elections.

On the part of the prosecutor a witness was produced, who gave in evidence, out of the corporation book so produced by the defendants, the orders of elections of *nineteen* persons there named; and further gave in evidence, that upon the elections of the defendants in the common council, on the 21st of *November* and 4th of *February*, several of the nineteen, to wit, *ten* on the 21st of *November*, and *twelve* on the 4th of *February*, who were freemen, free burgesses and common councilmen, and who had done several corporate acts, tendered their votes against the elections of the defendants. That the mayor rejected their votes; and that if they had been permitted to vote, that is to say, the ten on the 21st of *November*, and the twelve on the 4th of *February*, there would have been a majority against the respective elections of the defendants.

The counsel for the defendants then gave evidence of the *disfranchisement* of *all* the nineteen persons, before the time of the elections of the defendants, by producing the orders of disfranchisement in the same corporation book.

That thereupon the relator's counsel gave in evidence several orders out of the same book, by which it appeared that *fifteen* of the

the said nineteen persons had been *restored* in pursuance of peremptory writs of *mandamus*; which fifteen included the ten who had done corporate acts, and whose votes were refused on the 21st of *November*, and the twelve who had also done corporate acts, and whose votes were refused on the 4th of *February*; but by the dates of the orders, the restoration of the fifteen appeared to have been *subsequent* to the *election* of the defendants.

1776.

Symmers *versus* Regem.

Whereupon, and after the said entries and also another entry had been read, the counsel for the defendants did object thereto. For that the said *entries* of restoration in the said book were not admissible evidence, without first producing the *mandamuses*, and returns, or *attested copies* thereof. But the justices overruled the objection, and did permit the said matter to go to the jury as evidence of the restoration of the said persons without producing the writs, returns, or attested copies.

And thereupon the defendants' counsel, to prove the said issue, and that the defendants were duly elected, did produce, give in evidence, and read the stat. 4 *Geo.* 1. by the defendants particularly pleaded; and offered to give in evidence, that the said several persons (the 15 who had tendered their votes and done corporate acts) were not inhabitants, &c. and resident for one whole year before their respective elections; and did insist that such evidence ought to go to the jury, which the justices refused to admit. Upon which, the defendants' counsel tendered a bill of exceptions to *Godfrey Lill*, Esq. the judge of assise, which he sealed.

The bill of exceptions having been returned into the court of *King's Bench* in *Ireland* as part of the record, the judges, after hearing arguments upon it, gave judgment of *ouster* against all the defendants; whereupon this writ of error was brought.

Mr. *Buller* for the plaintiffs in error, argued, that this information was bad; *1st*, because filed against *six* different persons, for usurping *three* different offices. That such an information would clearly have been bad at common law. In 2 *Strange* 921. *six* were indicted for perjury, and judgment was arrested solely on that ground. In 1 *Str.* 623. an indictment against six for exercising a trade, was quashed. In *Rex* versus *Tucker et al. Pasch.* 7 *Geo.* 3. *B. R.* 4 *Bur.* 2,046. an indictment against *eleven*, was quashed for the same cause. 2 *Barnard.* 24. So in *quo warranto*, several cannot be joined. *Rex* versus *Jarvis* and *Clarkson*. *Tr.* 10 *Geo.* 2. MSS. If not good at common law, the next question is, Whether it is aided by the *Irish* statute 19 *Geo.* 2. *c.* 12. which directs, "that it shall be "lawful for the proper officer of the court, to exhibit one or

"more

1776. Summers *versus* Regem.

" more informations against any person or persons usurping " offices, and to proceed thereon in such manner as is usual in " *quo warranto*; and if it appears that divers rights may be deter- " mined on one information, one shall be sufficient to try them." This statute must be construed with some restriction; otherwise, the words themselves would carry a meaning nobody could contend for; and authorise an information against the mayor of one corporation, the aldermen of another, and the freemen of a third. The true construction must be to confine it to cases where the offices or franchises, are in the *same corporation*, and *ejusdem generis*. But here, the offices are of a *different nature*. Again, the statute gives no authority to join *different claims*, but speaks merely of joining *different persons*. Therefore, if this information had been filed against *one* defendant only, and had charged him, as in this case, with usurping the *three* different offices of freeman, free burgess, and common councilman, it would have been equally bad. There is no precedent of such an information, and the practice is universally against it. But suppose this were a case within the statute, and that the court could give leave to join different claims; it does not appear, that any such leave was given or any discretion exercised by the court on the occasion. Therefore, it must be taken to be an information at common law. Where several pleas are pleaded, it is the practice to state, that they are pleaded by leave of the court: And so it should have been done here.

2dly, As to the issues and the judgment on them, *two* of the defendants, *Marshall* and *Grubb*, have stated their right to the offices of freemen in virtue of their being *resident protestant traders* within the stat. 4 *Geo.* 1. which enacts, that, in that case, they shall have a right to be admitted without *paying a fine*. The right they state, therefore, is a right under this act of parliament; and not by virtue of an election. The two issues joined on these pleas is, that they are *not elected*: At the same time, their true title is not denied: and yet judgment of *ouster* is given against them. Whereas the issue joined being an immaterial issue, and not founded on any fact in the plea, the judgment ought to have been for them.

3dly, The judgment of the court below is *founded* on the *bill of exceptions*, of which they had no jurisdiction. *Davenport versus Tyrrel. Trin.* 9 *Geo.* 3. *B. R**. So that the judgment is on issues not disputed; against titles admitted; and founded on what the court has no jurisdiction of.

* Since reported in 3 *Blackst. Rep* 675.

Lastly,

Lastly. On the bill of exceptions itself, *four* different questions arise. 1*st*, Whether the persons whose votes were rejected at the elections of the defendants were even voters *de facto*, at the time of the election. 2*dly*, Whether the evidence given by the prosecutor to prove them members *de facto*, was proper and admissible for that purpose. 3*dly*, Whether if they were not freemen *de jure*, though they might be freemen *de facto*, it was not competent to the defendants, under the circumstances of this case, to prove at the trial that they were not so *de jure*. The 4*th* question is, if it were competent for them to do so, whether the evidence offered was proper and sufficient for that purpose.— As to the 1*st* question upon the face of the entry produced by the prosecutor to prove their admission, it appears that none of them were *actually* admitted, but only that there was an order they *should be admitted*. That is not an admission in any sense; and so it was held in *Rex* versus *Lisle*, *Andrews*, 163. But it is infinitely stronger here, because the order was not made by the *general assembly*, but by the *common council* only, who have no right to elect either freemen or free burgesses. Another reason against their being members *de facto* is, that they had been *removed* before the election of the defendants, and such removal was then in force. The evidence given of their being restored was subsequent to the time of the election. The *mandamuses* could have no effect till they were actually restored; and the very application for the *mandamuses* is evidence of their being out of possession. During the intermediate time, therefore, they could not be officers *de facto*. If disfranchised, it was no longer necessary to summon them to meetings of the corporation; though it should afterwards appear they were illegally disfranchised. It was so decided in 10 *Mod.* 76 *. But less would do here; for if the court should be of opinion, that while disfranchised, (unless rightful members,) they could not vote; the Judge did wrong in not receiving evidence to prove they were not *de jure* members.

1776.

SYMMERS *versus* REGEM.

* *Hil.* 10 *Ann.* Queen *v* Sutton.

The *second* question is, Whether the entries in the corporation books of their being restored to the office of common councilmen were proper and admissible to prove them officers *de facto*. The entries of restoration were not voluntary acts of the corporation, but under the authority and compulsion of writs of *mandamus*. Therefore, the writs of *mandamus* themselves should have been produced, as being the best evidence: As in the case of inquisitions taken under a commission, the commission as well as the inquisition must be produced.

1776. SYMMERS *versus* REGEM.

As to the third question. How far and in what cases the right of the electors may be gone into on informations against the elected, as a *general* question, has never been decided. That a *latent* objection cannot be gone into, has been settled; but the reason in that case is not applicable to the present. Here, there was no surprise on the prosecutor. Rejecting evidence of this sort does not tend to keep matters quiet; for if bad votes must be admitted, it is only introducing the elected into the corporation, for the sake of turning them out again. If the objection is notorious to the other party, it may be made; and here, the objection to the eleven voters in question was a matter notorious to both parties: Therefore, their right might be gone into. Where the elector has been ousted by *quo warranto*, though the defendant was no party to the suit, and may be a stranger to it, yet the judgment is evidence against him; because of the public notoriety. Here, the objection to these eleven persons, was the point on which both parties agree the election must be decided. Both, therefore, were equally apprized. If the legality of these voters could not be entered into on this information, a presiding officer at an election can have no power of examining whether the votes are legal or not. But in all elections, particularly of members of parliament, the presiding officer exercises his judgment whether a vote is good or bad. If the presiding officer has no right to judge, there can be no action for a false return. Besides, in this case, the evidence respecting the right, was begun by the prosecutor himself; by entries to shew they were qualified and rightful members. If so, the plaintiffs surely have an equal right to rebut that evidence, and to prove they were not qualified. If, in such cases, evidence of the right is not to be gone into, by delaying the trial of some informations, and pushing on the trial of others, bad members might be established and rightful ones ousted. For instance, suppose three classes of voters elected in *August*, *September*, and *October*; the 1st not duly elected; the 2d not duly elected without the votes of the first; the last elected by a majority, excluding those in *August*. On an information against the last, they must be ousted because they cannot disqualify the 1st set. Then, on an information against the 2d set, they must be established, and the prosecution fail, for the same reasons; then on an information against the 1st set, and they ousted; the consequence would be, that the 2d set, though not duly elected, would be established, and the third set, though duly elected, would be ousted.

The

The remaining queſtion is, Whether the evidence offered was proper to prove that the perſons rejected were not common councilmen *de jure*. This depends on the ſtat. 4 *Geo.* 1. which is ſtill in force and the law of the place. It enacts, "that no perſon "ſhall be elected, who is not reſident a twelvemonth before." If ſo, there can be no doubt of the propriety of the evidence offered; for it was to prove they were not reſident a twelvemonth before.—Upon the whole, whether the iſſue of "not elected" be conſidered as an iſſue of fact only, or of fact blended with law, the plaintiffs in error are equally entitled. For if an iſſue of fact only, then ten were not members *de facto*, having been removed; and the proſecutor's evidence ought not to have been received. If the iſſue is blended with law, and it was competent to the proſecutor to go into the right, it was equally competent to the defendants to diſprove what was given in evidence by the proſecutor. If it be merely a queſtion of fact, we had a majority at the poll. If of law, the evidence of the title of the electors muſt be received. Therefore, in either caſe, the judge did wrong; and conſequently the judgment ſhould be reverſed.

1776.

SYMMERS *verſus* REGEM.

Mr. *Davenport contra.* As to the *firſt* objection, that ſeveral perſons are included in one information; the ſtatute 19 *Geo.* 2. furniſhes a clear anſwer, by giving the court a diſcretion to join as many perſons as they pleaſe. And as to the objection that the leave of the court does not appear on the record, it never does appear; and there is no neceſſity it ſhould. *Secondly*, as to *ſeveral* claims being joined, it is ſaid, it would have been bad at common law: But the caſes quoted of ſeveral perſons joined in an indictment for perjury *, and for exerciſing a trade †, are not applicable. Six could hardly be guilty of the ſame perjury. But there is no caſe which ſays, one man ſhall not be called on, for uſurping different offices, in one information. The caſe in 2 *Barnardiſton* 25, ſays, "*two perſons* "cannot be joined in one indictment;" it don't ſay *ſeveral offences* cannot. But this act ſays, "by leave of the court *dif*-"*ferent uſurpations* may be joined." There is a caſe in *Rex* verſus *Clendon*, in 2 *Str.* 870. where it was ſaid, "two could not be "joined in an indictment for an aſſault:" But that has been often over-ruled. If there be no precedent, it muſt be reſolved on principles of law: And what principle of law ſays, the crown cannot call on a man to ſhew why he exerciſes ſeveral franchiſes? It is more beneficial for the defendant, that his different claims ſhould be joined, and one expence only be incurred. In *Co.*

* 2 *Stra.* 921.

† 1 *Str* 62. 3. 4 *Bur.* 2,346.

1776. SYMMERS *versus* REGEM.

Entries and *Rastal's*, there are several precedents of informations for usurping different offices. *Co. Entries*, 527. tit. *quo warranto*, for usurping *fourteen* different franchises. And in the Earl of *Shrewsbury's* case, *Ibid. sixteen* franchises are joined; and these in *quo warranto*, which is a stricter mode of proceeding than the information in *nature* of *quo warranto*, now substituted in its place. These cases occurred in the time of Lord *Coke*, and *Hobart* Attorney General. It might as well be said, that goods sold, and work and labour done shall not be joined. Therefore, the act of parliament is an answer to the first objection, and the principles of law to the second.—The next objection goes to the *form* of the issue with respect to *Marshall* and *Grubb*; who claim under the statute 4 *Geo.* 1. as resident traders. Now the right given by the statute, is a claim to be *admitted*, provided they are resident Protestant traders; but instead of shewing a title by *admission* under the act, they waive that, and shew a title by *election*, precisely in the same manner as the other defendants have done. Therefore, the replication taking issue on such election is right.

Thirdly, As to the objection that the court have proceeded on the bill of exceptions of which they had no jurisdiction. If they had not, it is a mere *nullity*; and if the judgment be good independent of it, the court will consider it as given on the verdict alone.

As to the fourth objection on the bill of exceptions, that the ten were not even voters *de facto*; 1st, because not actually admitted, and 2dly, because removed; if they were not *actually* admitted, the defendants themselves never were; for the entry of their admission is precisely in the same manner. As to their being removed, that of itself is an admission they were once burgesses: But by whom is the removal? By the common council *only* who are but a *part* of the body; consequently, had no right to remove them. With regard to the admissibility of the prosecutor's evidence to prove them voters *de facto*; if the defendants had a right to produce the entry they did, to disprove their right by shewing their amotion, it was clearly competent to the crown to shew they were restored by an entry in the same book, without producing the writs of *mandamus* themselves. Written evidence must be all taken together; therefore the evidence was clearly admissible; and if so, the act of restoration, by relation back, makes them in from 1761, and puts them in the same situation as if they had never been out of possession.—As to the 3d *point*, it is dangerous to attack *derivative* titles, by an objection-

jection to the *original* title. If the *electors* were *de facto* members they ought not to have been rejected on the ground of a defect at the time of their own election; nor could the question be gone into. There are but two ways of attacking the title of an elector *de facto*; the 1st is by information, which is the properest mode; because the party best knows his own title. The other is by an issue introduced on the record, upon the title of the person whose right is meant to be questioned. A third way was attempted in the famous case of *Strode* versus *Palmer*, *Lillies Ent.* 248. by *notice* on the record that particular votes would be objected to. But neither of these steps have been taken in the present case. Even judgment of *ouster* is not conclusive; for if by collusion, it may be controverted. *Rex* versus *Hebden*, *Andr.* 388—392. But where there is no judgment of *ouster*, no act of removal apparently tortious will do. In other cases, the court requires that notice should be given of the fact meant to be insisted on. *Tufton* versus *Newson*, 2 *Ld. Raym.* 1,354.—As to the 4th objection, It was decided in *Comyns*. 243. *Austin* versus *Osborn*, that a man may have a right to vote though never admitted.

1776.

SYMMERS *versus* REGEM.

Lord MANSFIELD.—There are three objections made to this judgment, independent of the subject matter of the bill of exceptions. The *first* is, that this is an information against *different* persons; and against the *same* persons for *different usurpations*. As to its being against the *same* persons for *different* usurpations, I think what Mr. *Davenport* has said and the cases he has cited are very strong to shew, that the information would have been good at common law: But if it would not have been good at common law, it is strongly within the statute 19 *Geo.* 2. *c.* 12. *sect.* 4: *a fortiori*, when the statute gives leave to exhibit one and the same information, if the court shall think fit, against *different* defendants for the *several* rights claimed or set up by them respectively. As to the other part of this objection, that this is an information against *different* persons; the answer is, that the act of parliament gives a discretionary power to the court to grant one or more informations according to the nature and circumstances of the case: And to suppose extravagant cases, or that the court would be absurd enough to join two franchises in different corporations, is to suppose a case that cannot exist. The legislature trusts the court with the discretion of joining them; and upon an application for leave, the court goes into the nature of the question to be tried. In this case, nothing could be more proper than to join the several defendants and the respective

 franchises

1776. franchises they claim, which are three. The right of election is exactly the same, the question is the same, and the evidence the same. But then it is contended, that supposing this *substantially right*, it is *formally wrong*; because it is not stated to be filed against the several persons and for the several offices they claim, by *leave of the court*. No such thing is necessary; no information ever states it to have been filed by leave of the court. The court gives the order and the information is filed. But such leave never appears on the record. Counsel cannot sign an information without leave is first given: But it never appears on the pleadings; therefore, that objection is out of the case.

SYMMERS *versus* REGEM.

The next objection independent of the bill of exceptions is, that *Marshall* and *Grubb* claim to be freemen under the *act* of parliament and not by *election*, and therefore, the issue as to them is an immaterial issue, being joined on the *election*. The answer to that is, the defendants themselves have put it so; and call their admission by the corporation, an election. They are not freemen *ipso facto*, by the act of parliament; but they must shew they are so, by proving themselves Protestants, resident in the town of *Galway* for a year antecedent to their being admitted, and that they have taken the oaths prescribed. Therefore the defendants themselves have led the prosecutor into the mistake, if any, by calling their admission an election. That objection therefore has no weight.

The next objection is, that the court below have given judgment not only on the verdict and what arises out of it, but have likewise gone into arguments on the bill of exceptions; and the judge before whom it was tried appeared personally and brought his bill of exceptions before the court of *B. R.* in *Ireland*. It certainly is so: The court has proceeded by mistake on the bill of exceptions, and gone into arguments upon it. Till very lately there was no bill of exceptions in *Ireland*, and they were at a loss in this case how to proceed. The statute giving the bill of exceptions, says, it shall be brought by the judge who tried the cause into the superior court. It is so here: A bill of exceptions from the *C. B.* comes into this court immediately: It goes from hence originally to the Lords in parliament. Where there is a bill of exceptions from the *B. R.* in *Ireland* the judge must bring it into this court. To ease him from that trouble in this case, a commission issued to Lord *Annaly* to take the acknowledgment of his hand and seal. They were doubtful whether they should not certify the transcript, as they do of all their other records.

But

But if the court of *B. R.* in *Ireland* had no jurisdiction upon the bill of exceptions, What is the consequence? They have proceeded on good and bad grounds. Though this court differs from them on the bad ground, it does not follow that they differ from them on the good. If there is a good ground independent of the bill of exceptions, that is sufficient. This court cannot reverse a right judgment, because the court in *Ireland* has proceeded erroneously in respect of something else which they ought not to have entered into.

Then we come to the merits of the subject matter of the bill of exceptions; and as to that, *four* questions have been made.

The first question is, Whether the ten voters who offered their votes, and were rejected, ought to have been received. Upon this question the validity of the defendant's election entirely depends.

The *1st* objection that has been made against their right to be received, is, that they were not even voters *de facto*. This objection has been attempted to be suppotted on two grounds: *1st*. because they were never admitted of the corporation, the order produced in evidence being only that they *should* be admitted, and does not say they *were* admitted. But on the proceedings produced it appears, that for ten years they acted as burgesses; and *that* which was called an order of disfranchisement, considers them as burgesses. So the order for their restoration is evidence to be left to the jury of their having been admitted; even supposing it rested on so nice a point, as whether it was made before or after their admission.

The next ground is, that they had been *disfranchised*; that the disfranchisement was still in force, and their restoration not till *after* the election. As to this objection a great deal depends upon the use of the word *disfranchisement*; otherwise it creates a confusion. But on looking into it, this is no disfranchisement, nor is there a pretence for calling it so: But it is doing that which the common council had not the semblance of a right to do; taking upon themselves to judge of the validity of an election ten years before, and to declare it *null* and *void* for want of a qualification at that time. The word "disfranchisement" signifies taking a franchise from a man for some reasonable cause; which they do not do, but only say they never were common councilmen. What authority have the common council to do that? None. It could be done only by information in the nature of a *quo warranto*. But suppose it had been a disfranchisement; how does it appear to the court that the com-

1776. Symmers versus Regem.

mon council have a right to disfranchise? It is incident to the corporation at large to disfranchise, but not to a select body. It does not follow that the select body who has a right to elect has from thence a right to disfranchise. But the fact is, it is no disfranchisement at all.

The next objection is, that the *order of restoration*, as it appears by the corporation books, was not made till *after* the election, and that this order alone is *not* the *best evidence*. As to that, the corporation books are clearly as good evidence to shew these persons were restored, as to shew they were disfranchised. It struck me at first, that the time of the restoration, and consequently the time of issuing the *mandamus*, which was not proved, might be material: That is; if the *mandamus* to restore the voters in question was *before* the *election* of the defendants, and the order *actually* restoring them, was not till *after*; and to support their right, it had been necessary to make the order *relate back* to the *date* of the *mandamus*, the time of the writ issuing should have been shewn. But upon consideration, I think, that let the restoration come when it will, it *relates* to the *original right*. It would be so in the case of a probable ground of disfranchisement. But here, there is not a probable ground: There is no colour for a removal; the act of common council was a mere nullity, and the restoration makes them in from the beginning. —Thus it stands as to their being voters *de facto*.

The next question is, being voters *de facto*, whether, on the trial of the respective rights of the several defendants, the elected, the rights of the voters to their corporate franchise can be gone into, without any notice either on the record or collaterally? It is true, that, in general, the person elected must take upon himself to support the right and title of his electors: It is so in a variety of cases. In the election of aldermen of the city of *London*, coroners, members of parliament, &c. All these are bound to support the rights of their electors. But, for the sake of justice and convenience, a distinction has been made in cases where the right of election depends upon corporate franchises. There are qualifications to the exception, such as have been stated by Mr. *Buller*. The general question has never been fully settled, though it has been touched upon in many cases. But this is settled; that no corporator is bound by surprise to go into the original qualification of any corporator in possession, who voted for him at his election; especially without notice. What would

be the condition of these people? There are ten of them who for ten years have been quietly in possession without any information, or the idea of an information being brought against them. How can the question be gone into with regard to their qualification at such a distance of time; more particularly as that qualification depends on their residence and inhabitancy for a year previous to the time of their election. 1776. STRAHEN'S *versus* REDR.

ASTON Justice.—This has not the least appearance of a disfranchisement. Can a common councilman declare the election of another common councilman null and void? In general a disfranchisement must be the act of the whole body: And if a special power be delegated to a part of the body, it ought to be shewn. But no such power appears in the common council. Therefore I look upon their order in this respect as a mere nullity. As to the qualification of the electors, it is not necessary at present to decide whether their right could have been gone into; because, if the mayor was bound to receive these votes, the election is clearly bad. As to the stat. 4 *Geo.* 1. that statute gives a man only a *right* to the freedom of the town; and to complete his title, he must go before the mayor, take the oaths and produce the other proofs required. The issue follows the words of the plea. Therefore I am at present satisfied, that the judgment entered is the proper judgment to be entered up on the verdict; and the circumstance of the court below having proceeded upon the bill of exceptions, shall not vitiate it.

WILLES Justice—My only doubt is as to *Marshall* and *Grubb*; for their right to be admitted freemen, is different from the others: and if they have performed the requisites of the stat. 4th *Geo.* 1. they are entitled to be admitted, and are by the act declared to be free. Whether the ten are good voters or not, as at present advised, I think *Grubb* and *Marshall* are good burgesses under the statute.

ASHHURST Justice.—I entirely concur that if enough appears upon the whole of the record to shew that the court of *B. R.* in *Ireland* have given a right judgment, we ought not to reverse it: And I think the bill of exceptions makes no difference. The issue is taken in the same words as the plea, and the plea calls it an election.

Lord MANSFIELD.—We will think of it as to this point and give you our opinion; and if any thing more is necessary, we will let you know it.

Cur. advisare vult.

 The

1776. STRAHAN *versus* REILLY [?]. The court afterwards said, they wished this case to be argued again. Accordingly it was argued again in *Hilary* Term 1777, by Mr. *Dunning* for the plaintiffs in error, and by Mr. *Mansfield* for the crown: But all the points were given up except two. 1st, Whether at all events the defendants *Grubb* and *Marshall* were not entitled to judgment, their title under the *Galway* act not being denied or put in issue? 2dly, Whether the judge below did not do wrong in rejecting the evidence offered, to shew that the persons rejected by the returning officer had not a right to vote?—After the argument, the court delivered their opinions, as follow:

Lord MANSFIELD.—There are two questions, *First*, Whether, upon this record, judgment ought not to be given for the defendants *Grubb* and *Marshall*? And, *Secondly*, Whether the judge below ought not to have gone into the several qualifications of the several voters, who voted as common councilmen, and whose titles he refused to enter into?

As to the first question, enough appears upon the record to incline us to think, that *Grubb* and *Marshall* really had a right to be freemen, if they had pleaded in a proper way: And if judgment of *ouster* on this record were to bar them for ever of the benefit of that right, a reluctance would arise in the court, from the general prejudice they have against any party losing his right, by a mere defect in his form of pleading. If that were the case, another principle must be adhered to, which is, that in all questions concerning the rights of corporations, it is most desirable and necessary, that the law should be certain, not only in respect of the matter, but also in respect of the form and manner of all their proceedings.

But my mind with regard to *Marshall* and *Grubb* is considerably eased, by being of opinion, that the judgment of *ouster* on this record will not bar them, if they apply in a proper way: Because they will then have a new title, not affected by the present judgment. It may happen, that persons might apply at one time under the act of parliament, when they had no title; and at the end of six months after they might have a very good one. If it should be so in respect of these two defendants, the question is still open.

This case, as it is now brought before the court, is an information against the two defendants, to shew by what authority they claim the offices of freemen, free burgesses, and common councilmen of the town and borough of *Galway*. As to the offices of *common councilmen* and *free burgesses*, the qualification and

mode of election depends entirely upon the *constitution of the borough*. As to the office of *freemen*, there are *two* modes of acquiring that right: The one, according to the constitution of the borough, by the election of the mayor, common council, and freemen in general assembly, agreeable to the rules of the borough and its charter: The other, by special act of parliament, which consists and is complicated of many facts. This latter gives a *right* only, not a *title*; because the qualifications of the claimants must be judged of. They are to be tradesmen of certain trades mentioned: Inhabitants within the borough for a year preceding: Protestants professed for seven years; and then they are to apply for their freedom. The act, therefore, gives but a *qualification*. The mode of obtaining their freedom is by application to the mayor upon the facts before mentioned. The mayor therefore, *ex officio*, is to judge whether they are qualified within the act or not; if they are, he must admit them; if not, he should reject them; and if he swears any one in without a qualification, such person may be *ousted* by an information.

1776.

Symmers versus Regem.

But these two modes of acquiring the freedom of this corporation are attended with different consequences. The freemen elected according to the constitution of the borough remain in possession of their franchise *for life*: Those admitted under the act of parliament continue so only during their actual *residence* in the town. It is necessary, therefore, to know, which are chosen the one way, and which the other.

To the present information, in nature of *quo warranto*, the two defendants have pleaded the *qualification* under the *act* of parliament. They certainly have pleaded that they desired to be sworn under the act of parliament: But then they join the title of common councilmen and the office of freemen in the same right, and they apply exactly the same words to each. They aver, that they were first proposed by the common council, pursuant to the new rules for regulating the town of *Galway* stated in the plea, which require that they should be first approved of by the common council, and propounded to be elected at the *Tholsell*. But that is not necessary under the act of parliament, 4 *Geo.* 1. Then they state that they were *duly elected*, and that being *so elected* into the office of freemen, free burgesses and common councilmen respectively, they took the oaths before the *mayor* and *two burgesses*; which is the form in cases of election by the *constitution* of the borough. Here, therefore, they plainly rest their title on *election*, and go to issue on that title.

1776. Upon this record it does not appear that they took any step to be made freemen by the act of parliament; therefore, they have not shewn a complete title under the act of parliament: But rest their claim upon another title, upon which they have gone to issue, and which has been found against them. It is impossible, therefore, to give judgment for them.

SYMMERS *versus* REBEM.

The next, which is an objection of less difficulty, is, that the judge below has refused to go into the qualification and capacity of several freemen and common councilmen who offered their votes. Let us state the objection as it is put, and examine it. The proposition is, that the judge, on this information, should have done exactly what he ought to have done, if the title of these persons, who were common councilmen *de facto*, had actually been in question before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, Whether the judge *collaterally* at the trial ought to have gone into the validity of these men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes sufficient open to the partiality of returning officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In cases of elections in the city of *London*, certain qualifications are required at the poll: Therefore it must be seen that in some degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate description; whether they were duly chosen or not, is not to be tried at the election of a third person; but they must be properly *ousted*. What? After a possession of twelve years, shall their right be called in question and tried on an information against other persons who are proposed to be freemen? It is impossible to be done. Suppose the right depended upon their being sworn in before twelve burgesses: Is the right of those twelve to be tried in an information against one? But the objection would go further; for there are corporations where there are thousands of freemen. Upon the trial of a right of a freeman's election made by them, is the court to go into the qualifications of all the thousands to have been made freemen at the time they were elected? Certainly not. For this purpose they are to be considered as having a right. It is stronger too in the present case, because these were restored upon a *mandamus*, though I do not go upon that. It is all one objection.

It

It would be to lay down a rule, that a party upon every new election shall be at liberty to go into the corporate rights of all the members *de facto*; which is a proposition that was never before heard of. Therefore I think the judge did right in refusing evidence to impeach their titles.

Suppose a corporate body consisting of twenty four were to add ten to their number. That would be an absolute nullity; because they never were corporators *de facto*. But the present question is, Whether in a *quo warranto* against particular members, you can go into the title of other corporators *de facto?* and I am clearly of opinion you cannot.

ASTON, Justice.—Upon the second question I am very clearly of the same opinion. The *Carmarthen* case is in point.

The more material question is the first question, whether upon this record, there is sufficient to distinguish the case of *Grubb* and *Marshall* from the others? It oes appear that perhaps *Grubb* and *Marshall* may have been very well entitled under the statute 4 *Geo.* 1. to have demanded their freedom. But I cannot conceive a case, where a man has a right under a charter or statute by claiming it of the proper person, that, if refused upon that claim, and that claim only appearing on the record, it would be a good and complete right without a real admission. Upon the whole of the record, I think that *Grubb* and *Marshall* have put their defence upon their election, and stand on the same title as the rest. They have pleaded the usage of the borough in relation to the election. They then state the new rules of *Ireland* relating to this town of *Galway*: that nothing shall be done by the *tholsell* till it has passed the common council. Then they state the oath to be administered; their residence, their being Protestants; their offer to take the oaths, and the demand of their freedom pursuant to the act. But saying so, does not make it in pursuance of the act.

Then the state that a *tholsell* was held, and that *Grubb* and *Marshall* were propounded to be admitted; and were in due manner *elected* in consequence. They plead therefore just as the rest do. They join with the rest at least in saying they were *elected*, and that they took the *oaths* agreeable to *the charter*. Upon this plea, therefore, this was not a demand of their freedom in consequence of the qualification under the act; but they have pleaded that they were elected as other persons, without the act. The issue pursues the plea, that they were not elected; and I am clearly satisfied that this was a proper and not an immaterial issue.

Willes

1776. SYMMERS versus REGEM.

WILLES Justice.—I am clearly of the same opinion on the 1st point, but not on the 2d; with respect to which the doubts I before entertained are not satisfied.—There is a confusion upon the record whether freemen and free burgesses are not the same. But certainly the common councilman was a different person, and is not included in the act of parliament. The first right is by election, according to the custom of the borough, and where a man is *elected*, he is in for life, unless he commits a forfeiture of his franchise. But the act of parliament declares the freedom shall continue only during residence. As it stands on the record, I cannot agree with my brother *Aston* that the plea of all the defendants is alike. For *Grubb* and *Marshall* have pleaded a title under the act of parliament. The others do not. The question therefore is, Whether there is enough stated in the plea to shew they are entitled under the act of parliament, and have done enough to acquire their freedom? If there is enough to shew that, and the issue is joined on the election, it is an immaterial issue.

Now they first state the qualifications; next the act of parliament: What is the other requisite for them to do? They are to demand their freedom pursuant to the act. Does the plea go to it? The words are, "that they offered to take the oaths pursuant "to the act of parliament." This was previous to any claim they had by election. But then they confound the two rights, by saying they *elected* and *admitted* them: As if the one term applied to one right, and the other to the other. They add that they have taken the oaths before the *mayor* and *two* of the *burgesses*; but joining the *burgesses* was not a necessary circumstance upon taking the oaths on admission: If they took them before the mayor, they had a right under the act of parliament. I do not therefore think the judgment of *ouster* should pass against them. There is a strong case in *Strange* 625. *Rex* versus *Hearle*, which makes me also in doubt, whether the judgment of *ouster* on this record will not bar the defendants' title under the act, even if they should apply in a proper way; unless they can shew a new *subsequent* acquired right.

ASHHURST, Justice.—I had a doubt about a repleader upon the first title: But the joining issue upon the election makes the title under the act of parliament unnecessary. For if they had meant to have relied on that, they would have demurred to the replication.

Further,

Further, upon these pleadings, the title they have set forth in the plea under the act of parliament, is not complete; because the qualification of being a Protestant, &c. is not a complete, but an inchoate title; which they had a right to have rendered complete, by taking the proper steps before the mayor. Have they taken those steps? If they meant to be admitted under the act, they should have given notice of such their intention. But it does not appear that they applied to the mayor to be admitted under the act. The contrary rather appears: For the admission set out is, an admission by the *mayor* and *common council*; which was an admission *under the charter*; and not under the act of parliament. Therefore, if there is not a complete title under the act of parliament, judgment of *ouster* must go against them. 1776. SYMMERS *versus* REGEM.

Besides, the court will not grant a repleader, but where complete justice may be answered. If a repleader were to be granted, the parties must begin from the point of pleading where the immateriality begins: The defendants say, it is in the replication. I think the issue taken on the replication is not an immaterial issue. What would be the consequence of granting a repleader? The relator might reply *de novo*. He might in that case demur; it would be doing nothing more therefore than putting him to demur for the duplicity of the plea, and the ends of justice would not be answered. If judgment of *ouster* is given on this right, it will not make the other title of the defendants bad. Therefore I think the judgment ought to be against them.

On the second point I concur, that the disqualification of voters for non-residence ought not to have been gone into at the time of election. If upon such a general issue as *non fuit electus*, it could be done, it would be the cause of endless prolixity.

Judgment affirmed.

PETYT *versus* BERKELEY, Esq.

Thursday, Nov. 28th.

Aston, Justice, absent. The court will *not* change the *venue* where an impartial or *satisfactory* trial cannot be had.—It is *too late* to change the *venue* after an order for time to plead, pleading issuably, where the terms are to take short notice of trial at the *first* sittings in *London* or *Middlesex*

MR. *Bearcroft* shewed cause against a rule *nisi*, for setting aside a rule obtained by the defendant for changing the *venue* from *Middlesex* to *Gloucestershire*.

The action was an action of scandal brought by a *Gloucestershire* justice of peace, for words spoken by the defendant Mr. *Berkeley* upon the hustings, at the time of the election of a member

1776. PETYT *versus* BERKELEY.

ber for the county of *Gloucester*; Mr. *Berkeley* himself being then one of the candidates. The defendant had obtained a rule, upon the common affidavit, "to change the *venue* from *Middle-* "*sex* to *Gloucestershire* where the cause of action arose." Mr. Serjeant *Wilson* afterwards moved to set this last rule aside; and obtained the present rule, against which Mr. *Bearcroft* now shewed cause; insisting that it was never too late to remove the cause till after plea pleaded.

Mr. Serjeant *Wilson* in support of the present rule alleged, 1st. That the whole county of *Gloucester* was so agitated at this election, on the one side or the other, that it was impossible, at least highly improbable, a jury of that county would try the cause impartially and without prejudice. 2dly, He objected that the defendant was too late in his application to change the *venue* from *Middlesex* to *Gloucestershire*, in as much as he had previously applied for and obtained an order for time to plead; upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial for the first sittings in *Middlesex*: And cited a case of *Burgess* v. *Carter*, in *C. B.* determined a few days ago, (on the 22d instant,) where the court upon the application of Serjeant *Kemp*, discharged a rule to change the *venue*; the defendant having (as in this case) obtained an order for leave to plead, pleading issuably, and taking short notice of trial.

Lord MANSFIELD.—Either ground is sufficient. 1st, The distinction taken is this. The *venue* may be changed after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, where the terms are to plead issuably and take short notice of trial at the first sittings in *London* or *Middlesex*, because there a trial would be lost *. But secondly, Supposing that out of the question, the other is a very strong ground why the *venue* should not be changed in this case. In all cases one would wish not only a fair, but an unsuspected trial. Here, the very nature of the action, the event which gave rise to it, and the circumstances of the parties shew, there cannot be a satisfactory trial. Of all trials the greatest latitude for bias is open in an action for words occasioned by election heat. A man may very safely swear there cannot be a fair trial upon hasty words, uttered at the time of the poll. The master when he takes up the freeholders' book, must pitch on men who are friends of the one side or the other. Therefore I

* *Vide* Hunter *v.* Gray, *Trin.* 28 *Geo.* 2. *C. B. Barnes*, (quarto edition) 493. *S. P.*—1 *Wils.* 245. Whiteman *v.* Thomson, *contra.*

think

think upon either ground the rule for discharging the rule obtained by the defendant should be made absolute. 1776.

The other judges concurred. Rule absolute.

PETYT *versus* BARKER.

REX *versus* JOHN TUBBS.

Same day.

THE Recorder of *London* (Mr. Serjeant *Glynn*) having obtained a rule *nisi* for a *habeas corpus* to bring up the body of one *John Tubbs*, an impressed sailor; Mr. Attorney General *Thurlow*, Mr. Solicitor General *Wedderburne*, Mr. *Wallace*, and Mr. *Cust* now shewed cause. The facts upon the affidavits appeared to be as follow:

The power of IMPRESSING *seamen, seafaring men*, and persons whose *occupations* and callings are to *work* in *vessels* and *boats upon rivers*, is founded upon *immemorial usage*: And there may be a legal right of *exemption* upon the *same foundation*.—What facts will not amount to proofs of such exemption.

Lieutenant *Tait*, being empowered by warrant from the admiralty in the usual form, "to impress seamen, sea-faring men, "and persons whose occupations and callings were to work in "vessels and boats upon rivers," pressed the defendant *Tubbs* a waterman, at that time *employed* in *navigating a ship* in the river *Thames*, below *Gravesend*. Upon which, *Tubbs* produced and shewed him the following certificate; "These are to certify to "whom, &c. that *John Tubbs* is duly admitted a *waterman of* "*the city of London*, to attend upon the lord mayor and alder"men of the said city, *when* and *as often as he shall be required*; "of which *all persons, empowered to impress* men into his Ma"jesty's service, *are desired to take notice*; for that by such "admission *he is exempted* from being impressed, or compelled "to such service. Signed *W. Dawson* water-bailiff."—The lieutenant, notwithstanding this certificate, took *Tubbs* and sent him on board the *Conquestadore*, a guardship lying at the *Nore*. In suport of the motion, *Dawson* the city water-bailiff made affidavit, "that there were *thirty-one* watermen belonging to the "lord mayor, whose duty it was to attend the lord mayor when "required, as mentioned in their certificate; and that *Tubbs* "was one."—One *Hill* made affidavit, "that the duty of the "city watermen was, to attend the lord mayor on the river to "courts of conservancy, and on other occasions when the duty "of his office called him on the river." *Four* instances were produced, taken from the city books, of watermen having been discharged who had been impressed, *viz. Thomas Kemp* in 1761. *Thomas Walker* and *Henry Cutter* in 1746 or 1747, and *Richard Underhill* in 1745. And affidavits were made by several of the city watermen, setting forth "that they had always heard and "been

1776. Rex versus Tubbs.

"been informed that the certificate of their being such, had "always been considered as a sufficient protection against their "being impressed."

On the other hand Mr. *Stevens*, the secretary of the admiralty, made affidavit, "that during *sixteen* years that he had "served in the admiralty office, the *usage* had always been to "give instructions to officers employed in the impress service, "restraining them from pressing persons of particular denomi-"nations and descriptions; but that to the best of his know-"ledge and belief, no officer was ever enjoined by such instruc-"tions *from pressing the watermen of the lord mayor of London*, "nor were they exempt on that account from being impressed." *Thomas Fearne*, one of the clerks of the admiralty-office, made affidavit, "that he had searched the book of entries containing "all the orders for the discharge of persons impressed; but that "of the *four* persons named in the affidavits in support of the "rule, he could only find the entry of the discharge of *Rich-"ard Underhill*, which was as follows." "To Sir *Robert Wil-"mot*." "Sir, I have laid before the lords commissioners of the "admiralty, your letter of this day's date, *requesting* the discharge "of *Richard Underhill*, one of the watermen belonging to the "lord mayor; and in answer thereto, am commanded to ac-"quaint you, that he *offered an able seaman to serve in his room*; "but *in regard to your application* in his behalf, they have or-"dered him to be discharged *without that expence*. *August* 9th, "1744."

It was contended against the rule on two grounds. 1*st*, That it was a matter of great doubt, whether if this exemption could be supported at all, it could be founded on any less authority than an act of parliament. 2*dly*, If it could be warranted by usage or prescription, whether there was sufficient evidence to support the usage in this case. Upon the *first* ground it was observed, that the exemption, in the extent in which it was claimed, was a general, permanent, perpetual, unqualified exemption, without reference to any circumstances of public exigence or emergency whatsoever. That by first principles of law, every man was bound to serve in defence of the state. It was true that, in respect of this particular duty, usage had confined the obligation to sea-faring men, whose habits of life had rendered them fitter and better qualified for the service. It was however equally true, that when from particular circumstances, or from principles of policy, it had been thought necessary to create exemptions of this description of persons, applications had

been

been regularly made to parliament for the purpose; as was evident from the ſtat. 1 *An. ſt.* 1. *c.* 16. *ſect.* 2. Stat. 6 *Ann.* *c.* 31. *ſect.* 2. Stat. 13 *Geo.* 2. *c.* 17. *ſect.* 1, 2, 3.—*c.* 28. *ſect.* 5. Stat. 19 *Geo.* 2. *c.* 30. *ſect.* 1. That theſe ſtatutes alone afforded the ſtrongeſt inference that no power, leſs than the authority of parliament itſelf, could grant ſuch an exemption. That the preſent claim clearly was not founded on any act of parliament; therefore, ſuppoſing there could be any other legal exemption, *uſage* or a *charter* were the only ground upon which it could be founded. As to the *latter*, it was an eſtabliſhed rule of the law of *England*, that the King cannot grant an exemption from any duties but thoſe he has a title to impoſe, and which are *perſonal to him*, and diſtinct from the general intereſt of the realm. 2 *Rol. Abr.* 198. letter K. *pl.* 1. *Ibid.* 202. letter T. *pl.* 2. line 15.—8 *Mod.* 21. That in the laſt caſe, though no judgment was given, the opinion thrown out by Lord Chief Juſtice *Parker*, was in point to the preſent objection. The queſtion there was, Whether the King by his charter could exempt the College of Phyſicians from *ſerving in the militia?* Lord Chief Juſtice *Parker* ſaid, "the better opinion ſeemed to be, "that the militia being for the defence of the realm, the King "could not grant a charter of exemption." A *fortiori*, therefore, the prerogative of the crown could not exempt from this ſervice, which was ſtill more eſſentially neceſſary for the defence and protection of the ſtate.

1776.

REX *verſus* TUBBS.

Secondly, as to *uſage* or preſcription, if it could be a foundation for the claim, it ought at leaſt to be ſet out with ſuch certainty and preciſion, as to leave no doubt in the minds of the court that it was well and ſufficiently grounded. That the exemption itſelf ought to be qualified, and guarded by ſuch checks and reſtrictions as not to ſtand in the way of any public emergency, or to impede the ſervice in general, by leaving it open to abuſe and impoſition; and above all, the *exemption* ought to be *public, evident*, and *notorious*. That where parliament had granted exemptions, ſpecial care had been taken to provide *regiſters* of thoſe perſons who were exempted; and if employed in other ſituations, the protection ceaſed. But here, the only memorial of retainer in the ſervice of the Lord Mayor was the *certificate* itſelf, *in the cuſtody of the party*; without any entry, minute, or public regiſter which the Admiralty might have recourſe to, to ſatisfy themſelves that ſuch certificate had been granted; or that no more than thirty-one had been iſſued. Without any badge, livery, or ſalary annexed to the employ-

1776. Rex *versus* Tubbs.

employment, to distinguish them from any other waterman or sea-faring person: And consequently, no check to prevent the certificate being passed from hand to hand, or from abuses being practised, to the ruin and obstruction of the service. That as to the custom itself, the affidavits went no further than *information* and *belief* that the certificates had been considered as a protection, without a suggestion, much less a positive averment, that they had been respected as such, by any officers employed on the impress service. As to the instances of persons discharged, they were much too few to establish such a claim; more especially as they amounted neither to a demand or proof of a discharge *as of right*. On the contrary, one of them was clearly on a ground directly the reverse of a demand of right, being granted *through favour*; and after an offer by the party to find a substitute in his stead. Besides, the defendant in this case was actually in *another service* at the time he was impressed: Therefore no longer entitled to protection. In addition to these objections, it was remarkable, that the statute 2 & 3 *Philip & Mary. c.* 16. *sect.* 8. by which the watermen's company was erected, and by which it is made penal for any waterman to conceal himself in the time of an impress, takes no notice of the present exemption; though the jurisdiction in such cases is expresly given to the lord mayor and aldermen. Therefore, as there was no *positive averment* of the existence of the exemption; as the evidence, if there had been such averment, was too loose and insufficient to establish the claim; as the prerogative of the crown could not grant it, and as there was clearly no act of parliament to warrant it, they submitted there was no ground or foundation for the application; and therefore, that the rule for the *habeas corpus* ought to be discharged.

The recorder of *London*, Mr. *Dunning*, Mr. *Davenport*, Mr. *Alleyne*, and Mr. *Lee contra*, in support of the rule; stated the ground of the application to be, that the defendant being retained as the *known publick* officer of the chief magistrate of the city of *London*, to be attendant on his person in the execution of a public trust, was privileged from being taken out of that service by any power whatsoever. That this *exemption* was *founded* in *usage* and *utility*, and that they claimed it as a *matter of right*. As to the several objections, they answered, 1*st*, That the legality of pressing, if founded at all, could only be supported by immemorial usage; there being clearly no statute in force investing the crown with any such authority. If founded in immemorial

memorial usage, of consequence, it might be *qualified* upon the same ground. Therefore, no act of parliament was necessary to warrant the exemption claimed. *2dly*, Admitting it to be a prerogative right, it was, as in all other instances of the prerogative, so far under the controul of the crown, that it might be waved at the King's pleasure. Consequently, there might be an exemption by charter: And the question in 8 *Mod.* 21. whether the crown by its prerogative could exempt from serving in the *militia*, did not at all apply; because the militia is established by act of parliament: Therefore the crown, independent of the legislature, could have no power to exempt.—Next, as to the objections made to the particular exemption claimed in this case, *1st*, That the mode and fact of the *retainer* were not sufficiently notorious, and therefore liable to abuse; they answered, it was sufficient if it appeared, as it did in this case, that the party was retained by the proper officer appointed for that purpose; that he was, in consequence of such retainer, obliged to attend the chief magistrate of the city, whenever called upon; and that the service was such as was indispensably necessary in holding courts of conservancy, and upon other occasions where the duty of the lord mayor required his attendance on the river. As to the *supposed* abuse, it should have been *proved*, and not merely inferred in argument. In fact, the certificate was a much better check than any badge or livery, or other device; the very description of the size and appearance of the party being inserted in the margin. As to the service being *seasonal* only, and not throughout the year, it was enough that they were liable to be called upon at any time the lord-mayor should think fit: And though the defendant was not actually in the service at the time he was impressed, he was within the *limits of the conservancy*, and of course within the protection. If he had actually entered into another service incompatible with his duty in this, the argument might hold. Lastly, as to the evidence in support of the claim, they said, it was in proof on the part of the defendant, that this privilege had never been violated except in *three* or *four* instances; in each of which the party was discharged; that the certificate had been universally considered as a full and sufficient protection; and on the other hand not a single instance could be produced of a refusal to discharge, or of a detainer in the service against the will of the party, where any of them had accidentally been impressed. That there was no positive denial of the right, but only negatively, that the wit-

1776.

Rex *versus* Tubbs.

1776. neſſes knew of no ſuch exemption. Therefore, as it was moſt clear that the right itſelf might have a legal foundation in immemorial uſage; as the utility of ſuch an exemption was a reaſonable ground for the claim, and as from the nature of the evidence the exiſtence of it was beyond diſpute; having been univerſally ſubmitted to, ſeldom infringed, and when infringed recognized and eſtabliſhed by the parties having been conſtantly diſcharged; they prayed the rule might be made abſolute, and the writ awarded.

REX *verſus* TUBBS.

Lord MANSFIELD.—I am very ſorry that either of the reſpectable parties before the court, the city of *London* on the one hand, or the lords commiſſioners of the Admiralty on the other, have been prevailed upon to agitate this queſtion.

Of the utility of this man to the city of *London* or to the lord-mayor, no one can ſeriouſly ſpeak: A man retained to earn half a crown a day; without badge or livery, without any obligation upon him to attend; whoſe entrance into the ſervice of the lord-mayor is voluntary; and who if he chuſes to quit it for any other employment creates no inconvenience to any body, or a difficulty to ſupply his place! Notwithſtanding this, if the city of *London* has a privilege of protecting thirty-one perſons from being impreſſed, they have a right to inſiſt upon ſuch privilege. On the other hand, where is the immenſe utility to the public ſervice with regard to theſe thirty-one perſons, whether they are preſſed or not? It is impoſſible they can be an object. The utility, therefore, in the one caſe or the other, cannot be the ground of the preſent diſpute. But it muſt have ariſen upon this: The city would not aſk or take the exemption of this man as a *favour*; but inſiſt upon it as a *right*; and in a manner in which they never inſiſted upon it before. And the admiralty, jealous of new rights of exemption being ſet up, would not grant it as a *right*. The real queſtion between them is, whether there is a *legal right* of *exemption* or not?

I was in hopes the court would have had an opportunity of inveſtigating this point to the bottom, inſtead of being urged to diſcuſs it ſo inſtantaneouſly; and without any evidence with regard to the foundation of the claim. I own I wiſhed for a more deliberate conſideration upon the ſubject; but being prevented of that, I am bound to ſay what my preſent ſentiments are.

The power of preſſing is founded upon immemorial uſage, allowed for ages: If it be ſo founded and allowed for ages, it can

can have no ground to stand upon, nor can it be vindicated or justified by any reason but the safety of the state: And the practice is deduced from that trite maxim of the constitutional law of *England*, "that private mischief had better be submitted to, than "that public detriment and inconvenience should ensue." To be sure, there are instances where private men must give way to the public good. In every case of pressing, every man must be very sorry for the act, and for the necessity which gives rise to it. It ought, therefore, to be exercised with the greatest moderation; and only upon the most cogent necessity. And though it be a legal power, it may like many others be abused in the exercise of it. A bailiff may execute legal process in such a manner as the court would commit him for: In like manner, the power of pressing may be abused; as by pressing the watermen of the lord-mayor whilst they are in the act of rowing him in his barge. And many other instances might be put.

Being founded in immemorial usage, there can be no doubt but there may be an exception out of it, on the same foundation; upon immemorial usage. I therefore lay out of the case all that has been said about the necessity of an act of parliament to create an exemption; and likewise all that has been mentioned relative to the doubt stated of the power of the crown to exempt by charter. If it were at all necessary to go into that question here, it might be sufficient to observe, that all the rights of the city have been confirmed by act of parliament.—But what has been approved by immemorial usage allowed for ages, is always supposed to have had a good beginning. Therefore, if the exception or exemption stands upon that ground, it is as good as the institution itself.

The only question, upon what appears before us, is, "Whether, "in fact, there is evidence of such usage as a matter of right?" I say, as a *matter of right*: For it is well known that many persons have granted protections; many have given badges to watermen, and have claimed that they should be exempt. Peers have done it; and questions in the House of Lords have arisen upon it. Members of the House of Commons have retained watermen; and perhaps the lords of the Admiralty may have paid regard to applications made in behalf of such men, and may have discharged them. So here, if the parties had cared to have made such application, it might have been attended to and complied with. For, as a matter of *favour*, it is impossible to suppose the lords of the admiralty would have made a moment's hesita-

1776. tion or dispute. But it is insisted on and claimed as a *matter of right*.

REX *versus* TUBBS.

Let us see therefore, whether this is an established exemption *of right*.

Every exemption throws the burthen the heavier on those who are subject to bear it. Therefore, for their sakes, as well as for the public service, all exemptions ought to be examined and clearly set out. In the first place, it does not appear from any law book, it does not appear from any history, it has not been suggested at the bar, that there is, throughout the whole kingdom, any other exemption by the *common law*. When I speak of exemption, I mean exemption out of the description: For to suppose the usage extends to private gentlemen amusing themselves with yachts, &c. is absurd.

Persons liable, must come purely *within the description* of seamen, sea-faring men, &c. He therefore, who is not within the description, does not come within the usage. The commission is not to press landmen, or persons of any other description of life, but such men as are described to be sea-faring men, &c. Officers are not within the description. It is a very strong circumstance, therefore, that there is in fact no other exemption stated or alluded to, which rests upon the common law. There are many exemptions by statute: But they are grounded upon considerations of public policy at the particular times of their being made; and upon the circumstance of its being in fact better for the service that the objects of those acts should be exempted, than that they should be subject to be pressed; as, apprentices, landmen entering voluntarily; fishermen; all foreigners; and in respect of these last mentioned, the reason is very obvious: For, during the time of a war, the act of navigation has been dispensed with, and two thirds of the crew of merchantmen have been allowed to be *foreigners*. Harpooners and others have been exempted. A line has been drawn with respect to the age: And many other instances might be put. But the exemption of those called the watermen of the city of *London*, is to be found in no statute or common law book whatsoever.

Let us see then, how the usage stands, upon the evidence *now* before the court: A certificate from the water-bailiff is produced, the contents of which have been read; and in the affidavits, apprehensions are stated of a reputed custom that these thirty-one watermen are exempted from being impressed. *Four* instances, and

no more, are produced, which arose at different times; and in respect of which this equivocal kind of fact is stated: that four persons were pressed, and that upon application from the lord-mayor to the admiralty, they were immediately, or soon after, discharged. But what the nature of the application was, whether *requested* as a matter of *favour*, or *demanded* as *of right*, is not stated. If requested as a matter of favour, it would have been very extraordinary for the lords of the Admiralty to have refused it. Here, the application is an application of right, by an order of court of the lord-mayor and aldermen. As to *three* of the instances produced, it is not ascertained what they were; nor is there any memorandum or mention made of them in the admiralty books. As to the *fourth*, the man had so little idea of a *legal right* to be *exempted*, that he offered to find another person to serve in his room: And this is the only instance where the court sees the *manner* of the application. On the other hand, very strong circumstances, as to what has been the usage, arise from the instructions which are given to the officers employed on the impress service; and which it would be unpardonable in the admiralty to omit. In these instructions, every *known* and established *legal* mode of exemption is expressly taken notice of and set out. In addition to this, it is sworn by Mr. *Stephens*, in his affidavit, "that there never was any instruction given not to press the watermen of the city of *London*." If it were a legal right, the city should have insisted on having that right taken notice of in the instructions. Even particular protections from the navy and victualling-office are taken notice of, but there is no mention of any protection from the lord-mayor with respect to his watermen. There is no instance of any officer upon the impress service ever having paid any regard to a water-bailiff's certificate, nor any case produced where the city has taken it up as a matter of right, or insisted upon it as such in a court of justice. Therefore, to give my opinion upon the case as at present stated, and upon the mere fact whether *this exemption*, as *here claimed*, is or is not warranted by immemorial usage, I cannot say it is. At the same time this opinion is without prejudice to any future evidence to be adduced in support of the claim, if any such can be furnished.

Willes Justice—Two things have been mentioned in the argument of this case which I think it necessary to take notice of. *First*, that on the part of the admiralty it has been contended, that the crown by its prerogative cannot grant an exemption from

 being

1776. Rex *versus* Tubbs.

being pressed. As to that, I apprehend the crown can grant such exemption, or at least a protection from the duty imposed. Because, in the crown alone lies the power of issuing press warrants. In those warrants, instructions are given to the officers not to impress any person protected by the navy, victualling-office, &c. Even the officers themselves grant protections: *a fortiori* therefore, if the officers and inferior boards can grant protections, the crown by its prerogative is entitled to the same privilege. *Secondly*, it has been insisted, that no authority less than an act of the legislature can grant an exemption. With regard to that, if the right of impressing was founded on an act of parliament, no authority less than that of the legislature could exempt from it. But this right is founded on immemorial usage, and though not specially given by act of parliament, is recognized by many. Therefore, I am of opinion, there may be an exception to it upon the same ground.—As to the claim of the present defendant, one objection is, that he is not entitled to the exemption, because he was not in the actual service of the lord-mayor at the time. But that is putting the question upon a very great nicety indeed. He certainly was within the limits of the conservancy, and ready to have served, if called on duty. The principal point is, the nature of the usage set up in support of the claim; whether in point of fact, the evidence amounts to proof of an immemorial usage. As to that, I think the evidence very weak. The affidavits in support of the rule, are merely of the apprehensions of some of the city watermen respecting their exemption, founded on the fact of their having heard that several persons had been discharged; and the instances produced are but *four* in number. *None* of them however are stated to be claims *of right*. Of the four, only one instance is entered in the admiralty books; and that, upon the face of the answer given to the application, clearly appears to have been a requisition of favour. As to the other three, no notice whatever is taken of them: Whereas, if they had been claimed and acquiesced in as a matter of right, it is impossible but there must have been an entry of them in the admiralty books. The provisions made by the stat. 2 & 3 *Philip & Mary*, and the observations made on it by Mr. Solicitor General, have great weight with me. If any such right had existed at that time, it was the duty of the city to have asserted it, and to have seen that these men were properly protected. As to the retainer itself, the only proof of it is the certificate of the water-bailiff, who speaks of a *due admission*.

That implies that there is a book or entry of admiſſions. But no ſuch book or entry of admiſſions is produced. Nor is there any badge, livery, or regular ſalary fixed. In *Charles* the *ſecond*'s time, upon a complaint by a peer to the houſe of lords of a breach of privilege in impreſſing one of his watermen, the houſe refuſed to vote it a breach of privilege. As to the utility of theſe men, it is of no conſequence: The lord-mayor can have little difficulty in finding watermen for the purpoſes in which theſe men are employed. Therefore I do not think, there is any thing that ſufficiently points out the nature of this ſervice or the uſage to be ſuch, as lays a foundation for the exemption and privilege ſet up.

1776.

Rex *verſus* Tubbs.

Ashhurst Juſtice.—The queſtion is, if the uſage of this exemption is ſufficiently made out. If it were coextenſive with the power of preſſing, which depends upon immemorial uſage, both would ſtand upon the ſame footing. But I think the evidence of the exemption in this caſe, *as a matter of right*, is very ſlender indeed. Only four inſtances have been produced; one of which clearly appears to have been aſked and granted as a matter of favour. In a caſe of preſcription, any inſtance of aſking the thing as a favour, is ſtronger than an hundred inſtances of uſage. Here there is no evidence of its having been allowed as a matter of right. Therefore I concur with the reſt of the court, in thinking that the exemption is not ſufficiently proved.

Per Cur. Rule diſcharged.

THE END OF MICHAELMAS TERM.

HILARY TERM

17 George III. *B. R.* 1777.

Thurſday, Jan. 23d.

Rex *verſus* Mayor, Aldermen *and* Capital Burgeſſes *of* Axbridge.

The court will not grant a *mandamus* to reſtore a perſon, where it is *confeſſed* he was *rightly* removed; tho' he had *no notice* at the time.

UPON ſhewing cauſe againſt a *mandamus* to reſtore *John Gaisford* to the office of town clerk, the corporation laid before the court, a very full and ſufficient cauſe for removing him; and that he himſelf had moſt poſitively and openly declared to the corporation, over and over again, that he would do no more of their buſineſs.

The proſecutor's counſel admitted that there was ſufficient cauſe of amotion; but objected that they had removed him, *without notice* to appear and defend himſelf.

Lord Mansfield.—The court will not grant a party the aſſiſtance of this prerogative writ, when it is acknowledged, that the corporation had very ſufficient cauſe to remove him; and when they would undoubtedly remove him again, the very inſtant he ſhould be reſtored. Therefore let the rule be diſcharged.

Rule diſcharged.

Friday, Jan. 24th.

Hartley *qui tam, verſus* Hooker.

An information *qui tam* upon the ſtat. 8 *Geo.* 1. *c.* 27. for a fraud in weighing and packing butter, exhibited in the ſheriff's court at *York*, may be removed into *B. R.* by writ of *habeas corpus cum cauſâ.*

THIS was an information *qui tam* exhibited in the ſheriff's court of the city of *York*, againſt the defendant for a penalty of a firkin, for a fraud in weighing and packing butter in the market of the city of *York*; founded on the ſtatute 8 *Geo.* 1. *c.* 27. for regulating the market of the ſaid city; which ſtatute directs, "that if any firkin, &c. of butter ſhall be "faulty in quantity or quality, the owner ſhall be liable to the "forfeitures in ſtat. 13 & 14 *Car.* 2. *c.* 26." By this latter ſtatute it is provided, "That all offences ſhall be determined in the

"sessions of peace for the county, city, borough, town or "liberty, or in the *court of record* of the city, town, or borough, "wherein such offence shall be committed." The defendant had removed the information into this court by writ of *habeas corpus cum causâ;* whereupon the plaintiff moved for a *procedendo:* and now, upon shewing cause, Mr. *Lee* in support of the *procedendo* argued, that this being a *new* created offence of which the court had *no original jurisdiction*, the court could not, by awarding this writ to remove the cause, give itself jurisdiction: and cited *Rex* versus *Wright*, 1 *Bur.* 543. *Hesketh* versus *Braddock*, 3 *Bur.* 1,847. *Comyns Dig. tit. Procedendo.* 1 *Sid.* 296. 1 *Lev.* 14.

1777.

HARTLEY *versus* HOOKER.

Mr. *Wallace*, *contra*, contended, that the jurisdiction of this court could never be taken away but by express words; and that there were no such words in the stat. 8 *Geo.* 1. *c.* 27. or in the stat. 13 & 14 *Car* 2. *c.* 26. As to the cases cited, they only prove that an *indictment* will *not* lie upon a *penal* statute, for a *new* offence: And no doubt, where a new offence is created by statute and a particular mode of punishment is prescribed, it must be pursued. But where this court has the same jurisdiction, and can give the same remedy (which is the case here), their jurisdiction is not taken away; And he cited the resolution of the judges in 1 *Jones*, 193. upon the statute 21 *Jac.* 1. *c.* 4. *sect.* 1. *Shoyle* v. *Taylor*, *Cro. Jac.* 178. *Rex* v. *Gaul*, 1 *Salk.* 372. *Cro. Jac.* 643, *Castle*'s case.

Lord MANSFIELD.—Suppose a writ of error had been brought, Would the jurisdiction be taken away in that case? Mr. *Lee.* I should think not.

Lord MANSFIELD.—That decides the question. There is the clearest distinction that can be made. If a *new* offence is *created* by *statute*, and a *special jurisdiction out of the course of the common law* is prescribed, it must be followed. If not strictly pursued, all is a nullity, and *coram non judice;* and objections may be taken in any stage of the cause. In such case there is no occasion to oust the common law courts; because not being an offence at common law, but punishable only *sub modo*, in the particular manner prescribed, they never could have jurisdiction. But where a *new* offence is *created* and directed to be tried in an *inferior court*, established according to the course of the common law, such inferior court tries the offence as a *common law* court; subject to be removed by writs of *error*, *habeas corpus*, *certiorari*, and to all the consequences of common law proceedings. In that

If jurisdiction be given to an inferior court of common law to try a *new* offence *created* by statute, the proceedings may be removed by *habeas corpus cum causâ*, or *certiorari*, unless expressly taken away. *Secus*, where the statute creating the offence, prescribes a special jurisdiction not known to the common law.

1777. that case, this court cannot be ousted of its jurisdiction without express negative words. Here it is clearly a common law proceeding, and therefore the removal of it into this court follows of course.

HARTLEY *versus* HOOKER.

The other Judges were of the same opinion.

Per Cur. Rule for a *procedendo* discharged.

Same day.

TAYLOR *versus* MILLS and MAGNALL.

A surety in a bond who pays the debt *after* a commission of bankruptcy issued against his principal, is not barred by the certificate, tho' the penalty of the bond was forfeited *before*.

UPON shewing cause why a new trial should not be granted, the case appeared to be as follows: This was an action for money paid, laid out and expended to the use of the defendants, and was tried at the Summer Assizes at *Lancaster*, 1776. The defendants *Mills* and *Magnall*, were partners with one *Bailey*; and in order to raise money the partnership had entered into bonds. In the year 1765, *Bailey* withdrew from the partnership; and wishing to be discharged from these bonds, application was made to the plaintiff to become surety instead of *Bailey*. He did so. Upon which the former bonds were delivered to *Bailey* to be cancelled. The bonds became due; then the defendants became bankrupts. When the obligees had got as much as they could from the partnership estate, and which amounted to no more than 6 *s.* in the pound, they came upon the plaintiff for the residue. He accordingly paid it; and then brought his action for money paid, laid out, and expended.—At the trial an objection was made that the bonds were not executed by *Magnall*; in answer to which, an affidavit was produced by *Magnall*, in which he admitted he was liable as well as the rest, and would have executed the bonds if he had been in the country at the time. Upon this, the jury found a verdict for the plaintiff.

The cause was argued last term by Mr. *Wallace* and Mr. *Lee* for the plaintiff, and by Mr. *Dunning* for the defendants: And two questions were made; 1st, Whether a surety in a bond, who pays the debt after a commission of bankruptcy issued against his principal, can maintain an action against his principal for the money so paid, the bond being forfeited before the bankruptcy, and the principal in possession of his certificate? 2dly, Whether the defendant *Magnall* was liable, not having executed the bonds? With respect to the latter question, the court, upon a suggestion that the affidavit of *Magnall* was a surprise upon him at the trial, ordered the cause to stand over to this term.—Upon the first question it was argued in support of the verdict, that the plaintiff not having paid the debt till after the bankruptcy, clearly could

not

not have been admitted a creditor under the commiſſion: becauſe he could not ſwear that the defendant was juſtly and truly indebted to him *before* the *date* and ſuing forth of the commiſſion: And the caſes of *Chilton* verſus *Wiffin*, *Trin.* 8 *Geo.* 3. *C. B.* 3 *Wilſ* 13. *Goddard* verſus *Vanderheyden*, *Ibid.* 12 *Geo.* 3. *C. B.* 3 *Wilſ.* 262. ſince reported alſo in 2 *Blackſt. Rep.* 794. were cited.

1777.

TAYLOR *verſus* MILLS *et al.*

For the defendants *contra*, it was contended, that the debt being due to the obligees, and the *penalty forfeited* at the time the commiſſion iſſued, was compleatly diſcharged and done away by the certificate. If ſo, the ſubſequent payment by *Taylor* could not revive the debt, and give a new cauſe of action to him as a new creditor. That the operation of the certificate as declared by the ſtatute was, to diſcharge the bankrupt from all his *then debts*; not from all his *then creditors*. But if, when diſcharged from an action by *one* creditor, he were to remain liable at the ſuit of *another* for the *ſame* debt, it would in effect be no diſcharge at all. Beſides, in this caſe, the original creditors had actually received a dividend from the defendant's eſtate of 6 *s.* in the pound, and there might be a proſpect of more. If ſo, the plaintiff ought to reſort to the commiſſion, and to ſtand in the place of the original creditors: but, as againſt the defendants, he was clearly barred by the certificate. Upon this ground, the court ſeemed clearly of opinion againſt the new trial; and that the certificate, though it was a diſcharge to the defendants, as againſt the original obligees who had ſought relief under the commiſſion, yet was clearly no bar to the plaintiff's demand, which accrued *ſubſequent* to the commiſſion. But they ordered it to ſtand over upon the ground of ſurpriſe. When it came on again this day, this latter ground ſeemed to be abandoned; and the firſt only relied on.

Mr. *Dunning* and Mr. *Wilſon* for the defendants. Mr. *Wallace* for the plaintiff.

Lord MANSFIELD.—When this cauſe came on laſt term, the court gave an abſolute opinion upon this point, and diſpoſed of it; they only gave leave for the defendant to file an affidavit as to the matter of ſurpriſe that was ſuggeſted, and to argue it upon that ground if he thought proper. But ſuppoſing the queſtion ſtill open, I continue of the ſame opinion: And this caſe is not harder than every other caſe of a debt ariſing *after bankruptcy* upon a *pre-exiſting ground.* At the time of the bankruptcy, the defendants were not indebted to *Taylor:* He clearly therefore, could not come in as a creditor under the commiſſion.

He

1777. He was not *damnified* at that time: And *till damnified* (which he could not be till he had been called upon and had paid), he could not bring an action. He did *not* pay *till after* the commission issued. Consequently, his whole damage and cause of action arose *after the bankruptcy*; and therefore could not be discharged by the certificate.—So the case stands as to the plaintiff. With respect to the money received by the original creditors under the commission, it is a discharge of so much of the debt; and the surety is only liable for the remainder: Consequently he can recover no more against the defendants. But as to *that*, he is a new creditor, and therefore is not barred by the certificate. It seems to me an extremely clear case, and not different from any where the cause of action, though it arises after the bankruptcy, is founded on a pre-existing ground.

TAYLOR *versus* MILLS *et al.*

Aston, *Willes*, and *Ashhurst* Justices, were of the same opinion.

Per Cur. Rule for a new trial discharged.

Same day.

ERNST *et al. versus* SCIACCALUGA.

MR. *Dunning* shewed cause against the defendant's being discharged out of custody upon filing common bail. He had been discharged under the insolvent debtors' act 16 *Geo.* 3. *c.* 38. and afterwards held to special bail for a debt *accruing subsequent* to the 22d of *January* 1776, *viz.* in *May* following. Mr. *Dunning* admitted, that by *sect.* 33. no person discharged under this act, could be arrested for any debt contracted or growing due *before* the 22d of *January* 1776. But the legislature, foreseeing a case might happen, where a party might be indebted for a cause of action subsequent to that time, had by the next section (34) expressly provided, "that no prisoner should "be discharged of any debt *subsequent* to the 22d of *January* "1776: And if any prisoner should stand charged with debts "previous, as well as subsequent, to that day, the justices "should discharge him as to the previous debts, and remand him "for all debts he should stand charged with in custody subse"quent to the said time." That here the debt, though incurred previous to the defendant's being discharged, was not contracted till long after the 22d of *January*; therefore, could not be discharged under this act: And consequently, the defendant was rightly held to bail.

Mr.

Mr. *Howorth*, *contra*, said, the doubt in this case arose upon the 22d section of the statute; by which it was enacted, "that "the creditors of any person discharged under that act, may "commence any suit against such prisoner for the recovery of "any sum which shall be *due* at *the time of his discharge*, but shall "not hold such prisoner to special bail." That these words "*at the time of his discharge*" meant to include *all* debts *due at that time*; and therefore, this being confessedly a debt previous to the defendant's discharge, the plaintiff, by the express words of the act, was precluded from holding him to special bail. He therefore prayed the rule might be made absolute.

1777.

ERNST *et al.* *versus* SCIACCALUGA.

Lord MANSFIELD.—Nothing can be clearer than this case. The act does not mean to discharge any debt contracted after the 22d of *January* 1776. The legislature has expresly drawn the line there. Here the debt, though contracted before the defendant's discharge, was subsequent to the 22d of *January*: Clearly therefore he might be held to special bail.

ASTON, Justice.—It is plain, upon looking into the different clauses of the act, that the justices have no power to discharge from any debt due after the 22d of *January*. The words of the 33d clause are, "that no person shall be arrested for any debt "contracted *before* the 22d of *January*, 1776." The 41st clause makes it still clearer. A man might be charged in custody, but not in execution. The act therefore, reciting "that certain evils have arisen from the future effects of debtors "being made liable," provides, "that such future effects only "of such persons as are there particularly mentioned shall be "liable to be taken in execution." Another case might happen; a man might not be charged at all, therefore, the 42d clause says, "if any action shall be commenced *after such time*, you "shall not imprison the debtor's person, nor proceed against "any effects not mentioned in the antecedent clause." All these clauses clearly relate to debts previous to the 22d of *January* only. But here the debt accrued subsequent to that time.—Therefore the rule must be discharged.

WILLES, Justice.—On the last day of last term I had some doubts, but now I am satisfied.

ASHHURST, Justice.—I am of the same opinion.

Per Cur. Rule discharged.

1777.

Same day.

CHARTER *versus* JAQUES *et al.*

Affidavit in *trover*, "that the "defendants have "*possessed* "themselves of "divers "goods belonging "to the "plaintiff, "and have "*refused* to "deliver "them up; "and that "*they or* "*some of* "*them* have "*converted* "and disposed of "them to "their own "use," is sufficient to hold to bail.

THIS came before the court on a rule to shew cause why the defendants should not be discharged upon filing common bail. They had been held to bail in an action of *trover* upon an affidavit, in which the plaintiff swore, "that the defendants (in number ten) had possessed themselves of divers "goods, belonging to him the plaintiff, and had *refused to deliver them up*; and that *they or some of them* had converted and "disposed of them to their own use."—Mr. *Dunning* who shewed cause insisted, that if the latter words "*they or some of* "*them, &c.*' were struck out, the other part of the affidavit was sufficient to hold the defendants to bail; it being positively sworn that the goods were in their possession, and that they had *all* refused to deliver them up.

Mr. *Mansfield* and Mr. *Morris* in support of the rule insisted, that *conversion* being the *gist* of the action, the words "*they or* "*some of them*" were not sufficiently precise to hold the defendants to bail; and if not, the other words alone clearly were not sufficient; possession and refusal being only evidence of a conversion. Mr. *Morris* added, that supposing the other words would have been sufficient alone, yet being rendered uncertain by what followed, the whole was bad; and cited 4 *Bur.* 2,126. *Champion* versus *Gilbert*, to that purpose.

Lord MANSFIELD.—The only question is, upon the particular words of the affidavit. The plaintiff swears positively, that *all* the defendants have possessed themselves of the goods, and that they have *all refused* to deliver them up: Which is of itself a conversion. They could not have refused to deliver the goods up, unless they had been demanded; and if all the defendants did not refuse to deliver them up, the plaintiff is perjured. The subsequent words "that *they or some of them* have converted" are surplusage.

Let the rule be discharged.

1777.

Rex versus Monday.

Saturday, Jan. 25th.

THIS was an Information in nature of *quo warranto* against the defendant; to shew by what authority he exercised the office of alderman of the borough of *Portsmouth*. The defendant, by way of plea, set forth a charter made in the 13th year of *Car.* 1st: And that he was duly elected under the charter. At the trial, the jury found a special verdict, the material facts of which were as follow: "That by a charter made in the 13th year "of *Charles* the 1st, the mayor, burgesses, and inhabitants of "*Portsmouth* were declared to be incorporated by the name of "the mayor, aldermen, and burgesses of the said borough, and "were to consist of a mayor, twelve aldermen, &c. That after "nominating the first mayor and twelve aldermen the charter "provided for the future election of the mayor and aldermen as "follows: That the mayor, aldermen, and burgesses for the "time being, or *the greater part of* them, from time to time, "may, and shall have power and authority yearly, on every "*Monday* sevennight before the feast of St. *Michael the Arch-*"*angel*, to assemble themselves together or the greater part of "them at the *Guildhall*, &c. and to continue there till *they*, or "*the greater part* of them then and there assembled, shall name "and elect one of the aldermen of the borough, &c. to be "mayor of the said borough." "That if at any time it should "so happen that any one or more of the *aldermen* of the said "borough for the time being should die or be removed, that "then and so often it should be lawful for the *mayor* and the *rest* "of the *aldermen* for the *time being*, or the *greater part* of them, "to elect or prefer one or more others of the burgesses of the "said borough for the time being to be an alderman, or alder-"men of the said borough, &c." The special verdict then stated, that from the time of the granting and acceptance of the said charter, whensoever it has happened that any alderman hath died or been removed, the mayor and all the other aldermen, or the *major part* of them, have assembled themselves together, &c. and have *concurred*, and have used and been accustomed to concur, in such election. That on the 3d of *May*, 1775, there was only a mayor, *viz. Philip Varlo*, and five aldermen, *viz.* Sir *Edward Hawke*, *John Carter*, *Edward Linzee*, *T. White*, and *W. White*, and no more; the seven remaining offices being

Election of the mayor.

Election of the aldermen.

vacant

1777 vacant by death. That on the said 3d of *May*, 1775, *Philip Varlo*, *John Carter*, *Edward Linzee*, *T. White*, and *W. White*, (the said Sir *Edward Hawke* being absent and residing without the reach of summons,) assembled themselves at the *Guildhall* for the purpose of electing seven burgesses to fill up the vacancies. That previous to any election being had, *J. Carter*, *T. White*, and *W. White* protested against the meeting. That *Varlo* the mayor called on *Carter*, and the two *Whites*, to nominate proper persons to fill up the vacancies, which they then omitted to do; that thereupon *Varlo* the mayor, and *E. Linzee* delivered in a list of seven persons, of which the defendant *Monday*, who was duly qualified, was one: That two, *viz.* *Varlo* the mayor, and *Linzee* one of the aldermen so met, elected these seven: But that the other three aldermen, *viz.* *Carter* and the two *Whites*, protested and voted against them. That *Monday* was placed first on the list, as being the properest person to be senior alderman. That then *Carter* and the two *Whites* delivered in a list of seven other burgesses; upon which *Varlo* and *Linzee* made an objection to *three* of them, for *not having taken the Sacrament*; and to *three* others, for *non-residence*; both which grounds of objection were *known* to *Carter* and the two *Whites* at the time of the election. That in other respects the above six persons were all duly qualified; and that *Goodwin*, who was the *seventh*, was qualified in every respect whatsoever. *Six* issues were taken on the plea: The question on the special verdict arose upon the fourth and sixth; the other *four* were found for the defendant.

REX *versus* MONDAY.

Mr. Serjeant *Grose* for the plaintiff, after stating the special verdict as above, argued as follows: The question is, Whether the defendant *Monday* was *duly elected?* That question depends upon the construction of the charter; whether the words "*the* "*greater part of them*," in the provision relative to the election of aldermen, means a *majority* of the mayor and aldermen *then in being*, or a majority of those *present* at the time of election. I shall contend they mean a *concurrent majority* of the *then existing body* of mayor and aldermen. If I am right in this construction, there is an end of the question; for it appears by the special verdict, that the defendant was *not* chosen by a *majority* of the *existing body*. But supposing the construction should be (as contended on the other side,) that a *majority* of the mayor and aldermen *present* may elect; still I say, the defendant was *not* duly elected. 1st. The election must be by a concurrent majority of the then existing body. The words of the charter are, "*ma-*

"*jor*

"*jor pars eorum.*" These words have been differently construed in different charters. They may, from the necessary construction of some charters, as applied to an *indefinite* body, mean a *majority* of those *present*; as applied to a *definite* body, a *majority* of the existing body at that time. But here, I say, from the necessary construction of the words of the charter, supported by constant *usage*, the *majority* of the *existing body* of mayor and aldermen must concur in the election of an alderman. This is apparent, 1st from the direction relative to the election of the mayor. The corporation is to consist of a mayor, twelve aldermen, and an indefinite number of burgesses. The mayor is to be chosen by the indefinite number of mayor, aldermen, and burgesses; and for this purpose the charter directs, "that the "*mayor, aldermen,* and *burgesses*, or the *greater part* of them, "shall have power and authority to *assemble themselves*, or the "*greater part of them*, at the *Guildhall*, on a certain day, and "to continue there, till *they*, or the *greater part of them*, there "*then assembled*, shall name and elect one of the aldermen to "be *mayor*." So that, where the charter intended the election should be by the *majority* of those *assembled*, it has directed it in express terms. But in the clause which prescribes the mode of electing the aldermen, the direction is, "that the whole existing body or the major part of them shall elect." The difference therefore is precisely marked; and the inference from it is decisive. For if the charter had intended that both elections should be by the *majority of those assembled*, it would have made use of the same words in both cases. I agree, if the *usage* had been the other way, it might have afforded a ground for the court to favour the construction which the defendant contends for: But here it is expressly found, that ever since the acceptance of the charter, the usage has constantly been, for the majority of the mayor and aldermen for the time being, to concur in the election of an alderman. Besides, this is a corporation by prescription: So that the charter may have been *accepted in part*, and *rejected in part*: And if so, this usage may have been anterior even to the charter. Therefore, supposing it not to be evident upon the face of the charter itself, that the major part of the existing body of mayor and aldermen ought to concur, the *usage* puts it beyond a doubt, that they *must* concur. If I am right in this part of the case, there is an end of the question. But 2*dly*, supposing the election may be by a *majority* of the greater part of the *existing* body *then present*, it is not pre-

1777.

REX *versus* MONDAY.

1777. tended on the other ſide that the defendant *Monday* was elected by more than *two*. Now there were *five* members *preſent*. Therefore, even in that way of ſtating it, the defendant clearly had not a majority. But to this it will be anſwered, 1*ſt*, that the *three* could not invalidate the election by the *two*, but by voting for ſome other perſons who were *eligible*. In reply, I ſay, they *did*: For they voted for a liſt of ſeven, of which the defendant was not one. I am aware that as to *three* of theſe ſeven it will be objected, that the votes in their favour were thrown away, becauſe they were *non reſident*, and the electors *appriſed* of the fact at the time. As to that, reſidence previous to a perſon's being elected alderman is not required by the charter. The aldermen are to be elected out of the burgeſſes. And when elected aldermen, the charter directs that they ſhall be reſident, under certain penalties and fines impoſed. But *as burgeſſes*, previous to their becoming aldermen, they are under no obligation whatever to reſide. Conſequently, abſence can be no diſqualification. The next objection made to this liſt is, that *three* others *had not received the ſacrament* within a twelve-month preceding the election; and that the electors were likewiſe appriſed of this fact. But I ſubmit that by the ſtat. 5 *Geo.* 1. *c.* 6. *ſect.* 3. it is plain, the election is *voidable only*, on that account, and *not void*. For by the words of that act it is provided, "that if the "party be not *removed*, or a *proſecution commenced* within *ſix* "*months*, no *incapacity* or *diſability* ſhall be *incurred*." And ſo it was expreſsly decided in *Crawford* v. *Powell*, 2 *Bur.* 1,016. If the election is only voidable, theſe perſons had certainly an *inchoate* right, which might afterwards be perfected. Moſt clearly therefore, the defendant could not be elected at that time; becauſe no man can be elected *de bene eſſe*. But 3*dly*, allowing for a moment that the *ſix* perſons objected to were ineligible, the *ſeventh*, whoſe name is *Goodwin*, ſtands *unobjected* to: His election therefore was indiſputably good. If ſo, how is it poſſible that any one of the *ſeven* perſons propoſed and voted for by the *two* only, can be ſaid to be duly elected? For they were all voted for *uno flatu*; not ſeparately, and diſtinctly, one after the other; but together and at one and the ſame time. Who then ſhall ſay *which* of the ſeven ſhall be excluded, or *which ſix* ſhall be elected with *Goodwin*? It is impoſſible ſuch an election can be good. Again, taking it that *three* only out of the *ſix* objected to by the other ſide were ineligible, there muſt be *four* excluded from their liſt; which would make the abſurdity the

greater. There could have been no means of deciding who should be excluded, or who should remain elected, but by setting them all up again, which was not done. Therefore upon either construction of the charter, whether the words "*major* "*pars eorum*" be interpreted to mean the majority of the existing body, or the greater part of the members present, the defendant clearly *was not duly elected*.

Mr. *Buller contra* for the defendant. As to the usage, no such usage was ever stated in a special verdict before, nor can it have any thing to do with the construction of the charter. It only proves that the corporation hitherto have always acted for the best, and been unanimous in the choice of the persons elected. In the present case, *three* of the members have endeavoured to obstruct the election. They were called upon to nominate proper persons, which they refused to do: Upon this, the *two* other members present, nominate a list of seven, and proceed to election. Instead of voting, the three protest both against the election and the elected. But it is settled that the *mere dissent* of the *majority*, will not invalidate an *election* by the *minority*, unless they vote for *somebody* else. The special verdict states, that they *did* vote for other persons. But I shall contend that these persons, were to their knowledge incapacitated at the time. The question therefore is, Whether the *three* could by such conduct prevent the *two* from filling up the vacancies with proper and eligible persons?

Much argument has been made upon the construction of the words "*major pars eorum.*" With respect to that, the first thing to be inquired into is, Whether there was a legal assembly? Now, I admit that by the charter the majority of the existing body must meet; and here all but one met. The assembly therefore was legally constituted. If so, it is settled, that the majority of the body, legally met, have a right to elect. This reduces the case to the fact of the election itself. But *first*, as to this being a borough by prescription, it is not so stated in the special verdict, nor is the assertion warranted in fact. But if it were, a corporation cannot accept a charter in part and reject it in part; but must receive or refuse it in *toto*. And so it was expresly decided in the case of *Yarmouth*. The question then is, Whether the *three* could, by the proceedings stated in the special verdict, prevent the other *two* from filling up the vacancies? I shall prove from a variety of authorities that they could not. 1st, It is clear upon the face of the verdict,

 that

1777. that they knew of the incapacity of the *six*; that they were *non-residents*; *dissenters*, and *had not taken the sacrament*. With respect to the non-residents it has been asked, how it appears by the charter that non-residence is a disqualification? I answer, that though the charter does not expressly provide that every burgess shall reside, it does not follow that every burgess is to absent himself from the borough. There will always be sufficient who do reside, and they are the persons who ought to be chosen. As to the aldermen, the charter and all the circumstances shew, that they must be resident. If the mayor is ill, one of the aldermen must act as his deputy: They are the judges of record, they are to hold the courts, &c. in short, they are to perform various requisites, all which shew they must reside. And by law they ought to do so. In 4 *Mod.* 36. it is laid down, "that every alderman ought to be a citizen and "*inhabitant* of the city where he is an alderman:" and in *Comb.* 197. S. C. *Eyre* Justice says, "residence is *incident* to "the duty and place of an alderman." *Carthew* 227. *Vaughan* v. *Lewis*, S. P. If so, non-residence is a cause for not admitting an absentee to be alderman: For in 5 *Co.* 58. it is laid down, "that whatever is sufficient cause to deprive an incumbent is "a good cause to *refuse* him."

REX *versus* MONDAY.

As to the three who had omitted to take the sacrament, the stat. 13 *Car.* 2. *c.* 12. expressly enacts, "That no person shall "be chosen who has not received the sacrament within a twelve-"month preceding the election; and in default of doing so, the "election shall be void." And so it was determined in *Harrison* versus *Evans*,* 5th *July* 1762.

That was an action of debt on a bye-law brought by the chamberlain of *London*, against the defendant for not accepting the office of sheriff. The defendant by way of plea stated, that he was a *dissenter* from the church of *England*, and had always attended the administration of the sacrament according to the forms of his own religion, and that he could not *in conscience* receive it according to the *rites of the church of England*. The question was, Whether he was liable to the penalty of the bye-law or could serve the office? Lord Chief Justice *Wilmot* in delivering the judgment said, "The stat. 13 *Car.* 2. *c.* 12. is not "only addressed to the *elected*, and a prohibition upon them, "but a prohibition laid down to the *electors*, if they have "notice: The legislature has commanded them not to chuse a

* See a short state of this case, *supra*, 393. *n.*

"non-

" non-conformist, because he ought not to be trusted. And " *Evans*, by refusing to take the sacrament, has negatived the " election." Both the statute, therefore, and authorities say the *election is void:* Consequently with respect to any legal effect or operation, it is as if there had been no election. But it is said, this objection is aided by the stat. 5 *Geo.* 1. *c.* 6. *sect.* 3. and the election by that act is rendered *voidable* only, and not *void.* That statute however has no relation to the present case: It applies only to persons who are in *actual* possession of the office, and was made to quiet such possession, if no legal remedy was pursued within a certain time: And upon that ground it was that the case of *Crawford* versus *Powell* was decided. But these persons never were in possession of the office: The objection was made at the time of the election; therefore the stat. 5 *Geo.* 1. *c.* 6. could not vary the operation of the stat. 13 *Car.* 2. And so Lord Chief Justice *Wilmot* said in *Harrison* versus *Evans.*

1777.

REX *versus* MONDAY.

If the *six* were *disqualified,* and the corporation were previously apprised of their incapacity, the only remaining question is, Whether the *two* had a power to elect, and whether the persons chosen by them were duly elected? It is asked, which six of the other list shall be said to be duly elected with *Goodwin?* As to that, when there are six vacancies, and six candidates proposed, and each candidate is chosen to fill the vacancy that corresponds to the order in which he stands upon the list, it is the same thing as if each had been elected separately. The special verdict states " that *Monday* stood *first* upon the list, as " being the properest person to fill the office of *senior* alderman." If therefore I can shew, either from principles or authority, that the *two* who voted for him had a power to elect, there can be no doubt of his being duly elected.—Two requisites are necessary to make a good election. 1. A capacity in the *electors.* 2. A capacity in the *elected:* And unless both concur, the election is a nullity. With respect to the capacity of the *electors,* their right is this: They cannot say there shall be *no* election; but they are to elect; therefore, though they may vote and prefer *one* to fill an office, they cannot say that *such a one* shall *not* be preferred; or, by merely saying, " *We dissent to every one pro-* " *posed,*" prevent any election at all. Their right consists in an *affirmative,* not a *negative* declaration. Consequently, there is no effectual means of voting *against one* man, but by voting *for another;* and even then, if such other person be *unqualified,* and the *elector* has *notice* of his incapacity, his vote will be thrown

1777. Rex *versus* Monday.

away. The firſt caſe upon this point, is *Regina* verſus *Boſcawen.* * *Paſch.* 13 *Ann. B. R.* There *ten* voted for *Roberts*, who was a qualified perſon, and *ten* for the *defendant*, who was *incapacitated* on account of non inhabitancy. Lord Chief Juſtice *Parker* and the whole court held, "that the votes given for "the latter were *thrown* away, and *Roberts* duly elected." That was the caſe of an *equal* number: But a *minority* does not vary it. For in *Rex* v. *Withers*, *Paſch.* 8 *Geo.* 2. *B. R.* *five* voters out of *eleven*, voted for the defendant upon a *ſingle* vacancy of a burgeſs for the borough of *Weſtbury*: *Six* others voted for *two* perſons *jointly*: And the court held, that the *double* votes were abſolutely thrown away. So in *Taylor* verſus mayor of *Bath*, *Mich.* 15 *Geo.* 2. *B. R.* *Twenty-eight* electors being aſſembled, 14 voted for *A.* 13 for *B.* and *one* for *C.* *A.* who had the 14 votes was unqualified, and his incapacity known to the electors at the time. *Lee* Chief Juſtice, in his direction to the jury ſaid, that the votes given to *A.* with notice of his incapacity, were thrown away. It afterwards came before the court, when *Lee*, Chief Juſtice, compared it to the caſe of voting for a dead man, and held, that *B.* who had the 13 votes were duly elected: And *Page* Juſtice ſaid, "That in ſuch caſe a *minority* of *two* "only would have been ſufficient to elect the other candidate." The ſame doctrine is laid down in *Oldknow* verſus *Wainwright*, 2 *Bur.* 1,017 —Here it is expreſsly found, that the *three* knew of the incapacity of the *ſix* perſons now objected to; therefore, their votes as to them are entirely thrown away. If ſo, the right of election being in the majority of the mayor and aldermen *for the time being*, and ſuch majority having met, the aſſembly was duly conſtituted; and the election of the defendant, though by a minority, was clearly a good election.

Lord MANSFIELD.—Is there any caſe where the charter has directed the election to be by the majority of the body, in which it has been held that a leſs number than a majority of the whole corporate body can elect? For inſtance, ſuppoſe the corporate body conſiſted of twelve; and two were dead. Is there any inſtance where the charter has ſaid the election ſhall be by a majority of the body; in which it has been held that *ſix*, which are a majority of the remaining *ten*, were ſufficient to elect?

ASTON Juſtice. In the caſe of *Rex* verſus *Reeſe*, and *Rex* verſus *Newſham*, common council man of *Carmarthen* *, it was clearly

underſtood

understood that if the major part of the corporation had been dead, it would have been in fact dissolved, or at least those who survived could not have assembled for the purpose of an election. But here the words seem to confine it to a majority of the members *for the time being*. 1777. REX *versus* MONDAY.

Lord MANSFIELD.—The general question is, Whether the defendant *Monday* was duly elected an Alderman? That depends upon two particular questions: 1st, Whether the assembly was duly constituted according to the directions of the charter, for the purpose of an election?—2dly, If it were, Whether the body so assembled have proceeded duly and regularly to the election of the defendant? As to the *first*, it has been argued on both sides, that a *majority* of the mayor and aldermen *for the time being*, are sufficient to constitute the assembly; though they do not make a majority of the whole corporate body appointed by the charter. Therefore I will not start a point not agitated at the bar, when the consequences might tend to a dissolution of the corporation. I will take it for granted, that a *majority* of the mayor and aldermen *for the time being*, was sufficient to constitute the corporate assembly: And the fact found by the special verdict is, that the majority of those in being did meet. When the assembly are duly met, I take it to be clear law, that the corporate act may be done by the majority of those who have once regularly constituted the meeting. The remaining question is, Whether the defendant was duly chosen by a majority of the persons so assembled?

There are different kinds of elections: Elections of members of parliament, verderors, corporators, &c. and different questions may arise out of each. Therefore, they must not be confounded together: And the present case must stand upon its own circumstances. Upon the election of a member of parliament or a verderor, where the electors *must* proceed to an election, because they cannot stop for that day, or defer it to another time, there must be a candidate or candidates: And in that case, there is no way of defeating the election of one candidate proposed, but by voting for another. But in the business of corporations, it is a different thing.

This is a motion in the shape and under the name of a proposal made to the *body*, by the mayor, who is the presiding officer, with the concurrence of one of the aldermen. But the essential part is, that it is made by the *mayor*, and he proposes *seven* persons together in one list to fill up seven vacancies. The question

1777. put, upon these seven persons so proposed, is not, *which* of them shall be elected aldermen, but whether the *seven* shall be aldermen? The only answer to be given to such a question is, *yes* or *no*. Suppose he had put it upon an individual. "I propose "*J. S.* Is it your pleasure that *J. S.* shall be chosen alder-"man?" The answer must have been *yes* or *no*. It is not a question *which* of *two* candidates shall be preferred but whether these seven persons so proposed should be chosen. Upon that motion there is a majority against them both in *substance* and *form*. That makes an end of the whole, and renders it unnecessary to go into the rest of the case. But I will just observe upon it. What sort of an election is this, where the mayor proposes *seven* persons at once? The electors might be inclined to vote for one, two, or three of them, and against the others; therefore they ought to have been put up in a regular way and polled for, *one* by *one*, and *yes* or *no* said to the proposal of each respectively. Such a complicated case never existed before. And what have the majority in fact done? They have voted for *one*, who is clearly well qualified, and duly chosen. So indeed are *three* more to whom in fact there was no solid objection; for non-residence is no objection under this charter. If the doctrine we have heard to-day respecting non-residence were to obtain, it would be of very extensive consequence indeed; and perhaps shake the constitution of half the boroughs in the kingdom. We all know that in *some* boroughs, *residence* is a *precedent* qualification. In fifty others it is not. *Here*, it is *not* a precedent qualification for a *burgess* to be elected an alderman. All the charter requires is, that *after* he is elected, he shall be resident:—As to the objection to the three others, because they had not taken the sacrament according to the rites of the church of *England*, I incline to Mr. *Buller*'s reasoning, that the stat. 5 *Geo.* 1. *c.* 6. operates rather as a protection to the possession, and as a bar to the remedy. If a man under this disability has been in possession six months, there shall be no remedy to turn him out: His title shall not afterwards be questioned on that ground. It is similar to the rule laid down by this court in respect of informations where the party has been in possession twenty years. But if this objection is made *recently* before any possession; as suppose the party upon being refused to be sworn in was to apply for a *mandamus*, and the answer on the application should be, that the ground of refusal was because he had not taken the sacrament, I should think it a sufficient objection. It is the possession only that is protected; and that, not till after the expira-

Rex v. Monday

tion

tion of six months. The object of the act was to lessen the rigour of the stat. 13 *Car.* 2. made in warmer times; and that has gone a great way.—Upon the whole, my opinion is, that the election of the defendant cannot be supported. For there are clearly *four* of the other list duly elected. His possession therefore is both against *their right*, and against the opinion of the *majority*

I think it necessary to observe upon one thing more, which I took notice of when this matter came on before: Though this is a borough cause, and a litigation with a view to the election of representatives for the borough, there should be a little conscience, for decency's sake. But in order to load the parties with expence, this monstrous special verdict has been made up, and the whole charter set out from beginning to end. Upon a former occasion a volume of unnecessary affidavits were made with the same view. Therefore I order it to be referred to the master to report the expence of the impertinent and unnecessary prolixity of the matter contained in this special verdict.

The three other judges concurred.

Per Cur: Judgment *pro rege*.

PATTISON *versus* BANKES.

Tuesday, Jan. 28.

A *bond* for payment of an *annuity* for a term of years is within the stat 7 *Geo.* 1. *c.* 31.—And so are ALL *bonds, bills, notes,* and *other personal securities* payable at a *future day certain*, tho' *not* given by the bankrupt for *goods sold* and delivered to him in the course of his trade.

THIS was an action of debt upon bond dated the 15th of *May* 1770, conditioned for the payment of an annuity. The defendant pleaded bankruptcy. Upon the bond being produced in evidence, the condition recited a lease for a term of years commencing in the year 1761, from the bishop of *Carlisle* to *Hole* and others, which by assignment vested in the plaintiff's testator. The plaintiff's testator assigned this lease to the defendant for an annuity, and the condition of the bond was for the regular payment of the annuity during the residue of the term, and for the performance of covenants. At the trial it was proved that the lease had been surrendered to the bishop, so that the bonds stood merely as a security for payment of the annuity. At the time of the act of bankruptcy and the commission issued, the *penalty* was *not forfeited*, the annuity having been regularly paid up to that time. A verdict was given for the plaintiff, subject to the opinion of court on this question: Whether this were a security within the stat. 7 *Geo.* 1. *c.* 31. all the payments being fixed at certain periods; though the bond itself

was

1777. PATTISON *versus* BANKER. was not given for goods sold and delivered, or for a debt contracted in the course of trade. —This case came on to be argued on *Wednesday, November* 20th, in *Michaelmas* term last, when Mr. *Wallace*, on the part of the plaintiff, mentioned the case of *Swaine* versus *De Mattos* in 2 *Str.* 1,211. But that case appearing strongly against him, and it being suggested on the other side, that the Court of *Common Pleas* had several times recognised it as an authority, Mr. *Wallace* gave the question up, and the court accordingly ordered judgment to be entered for the defendant. But the next day Lord *Mansfield* said, Mr. *Wallace* had been surprised by the above assertion: For inquiry had been made of the judges of the *Common Pleas*, and so far from recognizing the case in *Strange* to be law, they were rather of opinion it was *not* law. The court therefore ordered the case to stand in the paper for argument this term upon the question, whether *such* a bond was within the stat. 7 *Geo.* 1. *c.* 31.?

Mr. *Chambre* for the plaintiff argued, that the statute could not extend to any other cases than those particularly recited in the preamble; *viz.* "Securities for the sale of goods and merchan-"dize." That this was manifest not only from the words of the preamble, but from the *enacting clause*. 1st, The words of the *preamble* recited *no other* securities. 2dly, The only *inconvenience* mentioned in the preamble, was the inconvenience arising from the "*bankruptcy of* the *buyer* of *such goods*." Nothing therefore could more expresly confine it to the case of debts contracted in the course of trade, than the preamble did.—The only remaining question was, whether the provisions of the *enacting clause* extended further. As to that, the words "for the remedy "whereof," could be referable only to the mischief before recited. It was true, the expression "all and every person and "persons who have *given credit*," in a general unqualified sense, were applicable to every *common lender* of money; but here the subsequent words "*on such securities as aforesaid*," plainly shewed, the legislature meant such persons and such securities only as the preamble had before particularly specified. It would perhaps be contended that the words, "such securities" were referable only to the *form* of the securities enumerated in the preamble, *viz.* "bills, bonds, and promissory notes:" But by what rule of construction could they be made applicable to the *form* and not to the *substance* before described; *viz.* for *goods sold* upon credit. According to such a construction, if the vendor were to take a *covenant* to pay the money at a future day, instead of a bond, &c. he could not be admitted to prove his

debt

debt under the commiſſion. He added, that this was not the only ſtatute in which the legiſlature, meaning to remedy inconveniences *in trade*, had confined the remedy entirely and *excluſively* to ſuch inconveniences only: And inſtanced the ſtat. 19 *Geo.* 2. *c.* 32. As to the caſe of *Swaine* verſus *De Mattos*, 2 *Str.* 1,211. it was only a *niſi prius* caſe, and the note itſelf extremely ſhort; therefore, entitled to very little weight, againſt the plain import and meaning of the ſtatute. 1777. PATTISON *verſus* BANKES.

Mr. *Wood* for the defendant *contra* contended, that this being a remedial law, the words of the *enacting clauſe* could not be reſtrained by the preamble. That they were *general*, *viz.* "all "and *every perſon* or perſons;" (not, *merchants* and traders only) "who have or ſhall give credit on ſuch ſecurities as afore-"ſaid to *any* perſon who ſhall become bankrupt, upon a *good* "and valuable *conſideration bonâ fide*, for *any ſum* or *ſums* of "money, or *other* matter or *thing*." Nothing can be more general: And they are a deſcription of the *conſideration*, not of the form of the ſecurity. The intention of the legiſlature was only to put debts payable in future upon a day certain, on the ſame foot as debts actually become due; whether ſuch debts were or were not contracted for goods ſold or in the courſe of trade. In *Tully* verſus *Sparkes*, 2 *Lord Raym.* 1,546. the only ground of deciſion was that the debt was a *contingent* debt; and the court took no notice of its being for a matter out of trade; *viz*, upon a *marriage bond*; which would alone have been ſufficient, if this were a good objection. But it clearly is not. The ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 22. meaning to extend the benefit of the ſtat. 7 *Geo.* 1. *c.* 31. ſtill further, by allowing the creditors there deſcribed to become petitioning creditors, in reciting it, uſes the words of the enacting clauſe, "*perſons taking* "*ſecurity for their money*," in preference to thoſe of the preamble. In *Viner's abridgement*, tit. *Creditor and Bankrupt*, p. 72. *Ex parte Jefferies*, the court decided upon the debt being *contingent*; not becauſe it aroſe upon *marriage articles*, and therefore *out of trade*. *Swaine* v. *De Mattos* is in point, and, though a *niſi prius* caſe, was recognized in *Goddard* verſus *Vanderheyden*, 3 *Wilſ.* 271. There is great reaſon why the ſtatute ſhould extend to all juſt and meritorious creditors. The ſpirit and general principle of the bankrupt laws is to put them all upon a level: The conſtruction in *contingent* caſes has been, to make no queſtion whether the debt did or did not ariſe in trade; but ſimply to inquire whether it were *contingent* or not: and the practice

by

1777. by the commissioners has been to admit all debts payable at a future day certain, without any distinction as to the consideration, provided it were valuable and *bonâ fide*. Therefore he prayed judgment for the defendant.

PATTISON *versus* BANKES.

Lord *Mansfield*, I am very clear. First, here is a construction by the stat. 5 *Geo.* 2. *c.* 30. *sect.* 22. which, without conceiving a doubt, takes it for granted, that the stat. 7 *Geo.* 1. *c.* 31. is not merely confined to *securities* for *goods sold* and delivered in the course of trade, but that it extends *generally* to *all* personal securities for a *valuable consideration*, where the time of payment is certain, though postponed to a future day: And it corrects the blunder in the preamble of the stat. 7 *Geo.* 1. which, after specifying particular securities, adds, "or other *persons* "*securities*," which clearly should have been "other *personal* "securities." A few years after, Lord Chief Justice *Lee*, in the case of *Swaine* v. *De Mattos* * at *nisi prius*, looked upon it as a general proposition and a settled point. These alone are strong grounds for extending it to *all* securities. But to consider it upon the construction of the act itself. The *preamble* is certainly *special* and *particular*. Therefore, without express words in the enacting part, the operation of it must be confined to the preamble. But there are a variety of cases, where it has been determined that strong words in the *enacting part* of a statute may extend it beyond the preamble. Here, there are express words in the *enacting part* which are more large than the preamble. The preamble says "the consideration must be *goods* "*sold* upon trust by *merchants* or *traders*." The enacting part says "*all persons* who shall give credit on *such securities* as afore- "said, upon a *good* and *valuable consideration bonâ fide*, for any "*sum* or sums of *money*, or *other matter or thing whatsoever*." The words "*such securities*" are only referable to the securities before particularly mentioned, and in which the day of payment is certain, though not yet come. If the words were less general than they are, their meaning is fully explained by the stat. 5 *Geo.* 2. *c.* 30. *sect.* 22. and the opinion of *Lee* Chief Justice at *nisi prius*. The constant practice too of the commissioners is very material. Therefore I am well satisfied the act extends to *all* personal securities for *money* or *other valuable thing* where the day of payment is certain, though not yet come.

* Trin 17 *Geo.* 2. *Str.* 1211.

ASTON Justice.—This being an explanatory law, it does seem as if the statute meant only to provide in future, that *such persons* and *such securities* as are mentioned in the preamble, might

be

be admitted under the commission. But the enacting part goes a little further: Since that, the construction put upon it by the stat. 5 *Geo.* 2. *c.* 30. *sect.* 22. followed by the opinion of Lord Chief Justice *Lee*, and the constant practice of the commissioners, makes it very strong. 1777. PATTISON *versus* BANKES.

Per Cur. Judgment for the defendant.

TRUEMAN *versus* FENTON.

Same day.

A bankrupt, *after* a commission of bankruptcy sued out, may in consideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a *satisfaction* in *part* or for the *whole* of his debt, by a *new* undertaking or agreement — And *assumpsit* will lie upon such new promise or undertaking.

THIS was an action on a promissory note bearing date the 11th *February* 1775, payable to one *Joseph Trueman* (the plaintiff's brother) *three* months after date for 67 *l.* and indorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated.—The defendant pleaded, 1st, *Non-assumpsit.* 2dly, "That on the 19th *January* "1775, he became bankrupt, and that the debt for which the "said note was given was *due* to the plaintiff *before* such time "as he the defendant *became bankrupt*; and that the note was "given to *Joseph Trueman* for the use of, and for securing to the "said plaintiff his debt *so due.*" The cause was tried before Lord *Mansfield* at the sittings after *Michaelmas* term 1776, when the jury found a verdict for the plaintiff, damages 72 *l.* 12 *s.* costs 40 *s.* subject to the opinion of the court upon a special case stating the answer of the plaintiff in this action, to a bill filed against him in the *Exchequer* by the present defendant for a discovery of the consideration of the note; the substance of which was as follows: "That on the 15th of *December* 1774, the defendant *Fenton* purchased a quantity of linen of the plaintiff *Trueman*, and it being usual to abate 5 *l. per cent.* to persons of the defendant's trade, the price, after such abatement made, amounted to 126 *l.* 18 *s.*—That at the time of the sale it was agreed, that *one half* of the purchase money should be paid *at* the end of *six weeks*, and the *other half* at the end of *two months*: And in consideration thereof, the plaintiff *Trueman* drew two notes on the defendant for 63 *l.* 9 *s.* each, payable to his own order, at *six weeks* and *two months* respectively. That the defendant accepted the notes, and thereupon the plaintiff gave him a discharge for the sum. He then denied that he had proved or claimed any debt or sum of money under the commission: But set forth, that he acquainted the defendant he was surprised at his ungenerous

1777. TRUEMAN *versus* FENTON.

behaviour in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the *defendant pressed* him to take up the two notes, and *proposed* to give him a security for *part* of the debt. That afterwards, on the 11th of *February* 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67 *l.* in satisfaction of his debt, if he would take up the two notes and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother *Joseph Trueman* or order, three months after date. That he took up the two acceptances and delivered them to the defendant to be cancelled, and *accepted the above note for* 67 l. *in satisfaction and discharge thereof.* That a commission of bankruptcy issued against the defendant on the 19th of *January* 1775, and that the bankrupt obtained his certificate on the 17th of *April* following." The question reserved was, Whether the facts above stated supported the *merits* of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue. But if the *merits* of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller* for the plaintiff argued, that the note, though given after the bankruptcy, was in this case binding upon the defendant, and therefore the certificate was no bar to the present action. 1st, Because the goods, though sold before the bankruptcy, were sold *on credit*, and not to be paid for till a future day: Therefore, if no *security* at all had been given, the debt could not have been proved under the commission; because such a case does not fall within the provisions of stat. 7 *Geo.* 1. *c.* 31. If not, this is simply the case of a sale of goods on future credit, for which the vendor receives a note after the vendee is become bankrupt: Because, the two drafts drawn by the plaintiff on the defendant at the time of the sale, and accepted by the defendant, could not vary the agreement: It was still a sale on future credit; and no debt due till after the bankruptcy. Besides, they were afterwards delivered up. If no debt was due at the time of the bankruptcy, the merits of the plea are clearly not proved: For the merits are, that the debt was *then* due. Now it clearly was not due, and therefore the certificate was no bar to the demand. 2dly, Supposing it could be contended, that there was any thing like a debt due before

before the bankruptcy, yet the plaintiff upon the facts stated is still entitled to recover upon the note in question.—The consideration was for a fair *bonâ fide* debt, without any mixture of fraud or pretence of undue advantage by the plaintiff. On the contrary, there was a gross fraud on the part of the defendant, in obtaining the goods upon the eve of his becoming bankrupt: and the conviction of such his misconduct was the inducement with him to offer the security now in dispute. If he were to discharge the whole original debt, it would not be more than was due, and what in conscience he ought to pay. But here the plaintiff has agreed to accept much less than in conscience was due to him. If so, like every other debt which a man is bound in conscience to discharge, it is a good ground for raising an *assumpsit*. The slightest acknowledgment is sufficient to revive a debt barred by the statute of limitations. So, where a man, after he comes of age, promises to pay a debt contracted during his minority, *assumpsit* lies. As to the case of a promise by a bankrupt to pay a debt in consideration of a creditor's *signing* his *certificate*, *that* is made void by the statute 5 *Geo.* 2. *c.* 30. *sect.* 11. But even *that* would have been a good ground of action *before* the statute; and it is the *only* exception made. The certificate, no doubt, is a provision for the *benefit* of the *bankrupt*. But he may wave it; and here he has waved it for a *good* and *valuable consideration*. If so, he is bound by the contract. In addition to this general reasoning, he cited the case of *Lewis* versus *Chase*, 2 *P. Wms.* 620. and *Barnardiston* versus *Copeland*, argued in the *Common Pleas*, in *Hilary* and *Easter* terms 1761. MSS.

1777.

TRUEMAN *versus* FENTON.

Mr. *Davenport*, *contra*, for the defendant, contended, that the plaintiff had no other remedy for his debt, but by resorting with the rest of the creditors to the commission. That the transaction, though coloured over, was clearly intended as an evasion of the bankrupt laws, and therefore manifestly illegal. That the plaintiff's taking up the *two drafts*, and accepting another security short of his real debt, could in no respect be a new consideration to the defendant; because he was at all events discharged from *them*, by his certificate: And as to the objection that the original debt itself was not within the stat. 7 *Geo.* 1. *c.* 31. and therefore could not have been proved under the commission, it clearly might, allowing a rebate of interest for the time of the credit given. That the question depended solely upon the construction of the bankrupt laws, and particularly the stat.

1777. TRUEMAN *versus* FENTON. ſtat. 5 *Geo.* 2. *c.* 30. by which it was clear, that where ſuch a promiſe or undertaking is made by a bankrupt before his certificate obtained, it is void. That any other conſtruction would open a door to that colluſion reſpecting the certificate which the ſtatute meant to avoid, and at the ſame time be highly injurious to the bankrupt. Therefore he prayed judgment might be entered for the defendant.

Lord MANSFIELD.—The plea put in, in this caſe, is, that the debt was *due* at the time of the act of bankruptcy committed; and on that plea, in point of *form*, there was a ſtrong objection made at the trial, that the allegation was not ſtrictly true: Becauſe at the time of the ſale, credit was given to a future day; which day, as it appeared in evidence, was ſubſequent to the act of bankruptcy committed. To be ſure, on the *form* of the plea, the defendant muſt fail. But I never like to entangle juſtice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and deſtruction of both. I put it therefore to the counſel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the court, whether according to the facts and truth of the caſe, the defendant could have pleaded his certificate in bar of the debt in queſtion: And in caſe they had refuſed to do ſo, I ſhould have left it to the jury upon the merits. The counſel for the plaintiff very properly gave up the point of form. The queſtion therefore, upon the caſe reſerved, is worded thus: Whether the facts ſupport the merits of the defendant's plea? That is, Whether on the merits of the caſe properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action? Now, in this caſe there is no fraud, no oppreſſion, no ſcheme whatſoever on the part of the plaintiff to deceive or impoſe on the defendant; and as to colluſion with reſpect to the certificate, where a creditor exacts terms of his debtor as the conſideration for ſigning his certificate, and obtains money or a part of his debt for ſo doing, the aſſignees may recover it back in an action. But that is not the caſe here. So far from it, the tranſaction itſelf excluded the plaintiff from having any thing to do with the certificate. No man can vote for or againſt the certificate till he has proved his debt. Here the plaintiff delivers up the *two* drafts bearing date *prior* to the act of bankruptcy, and by agreement accepts *one* for little more than half their amount, bearing date *after* the commiſſion of bankruptcy ſued out.

Moſt

Most clearly therefore he could not have proved *that* note under the commission; and if not, he could have nothing to do with the certificate.—That brings it to the general question, Whether a bankrupt, *after* a commission of bankruptcy sued out, may not, in consideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt by a new promise, it must be founded upon the ground of its being *nudum pactum*. As to that, *all* the debts of a bankrupt are due *in conscience*, notwithstanding he has obtained his certificate, and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of *Equity* gone upon these principles? Where a man devises his estate for payment of his debts, a court of *Equity* says, (and a court of law in a case properly before them would say the same,) all debts barred by the statute of limitations shall come in and share the benefit of the devise, because they are *due* in *conscience*. Therefore, though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the statute of limitations, is very true. The slightest acknowlegement has been held sufficient, as saying, "prove your "debt and I will pay you,"—"I am ready to account, but "nothing is due to you." And much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man who, after he comes of age, promises to pay for goods or other things, which, during his minority, one cannot say he has *contracted* for, because the law disables him from making any such contract; but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good.—Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff, by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit.

1777.

TRUEMAN *versus* FENTON.

1777. It was grofsly difhoneft in him to contract fuch a debt, at a time when he muft have known of his own infolvency, and which it is clear the plaintiff had not the fmalleft fufpicion of, or he would not have given credit and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquifhes all hope or chance of benefit from a dividend under the commiffion, by forbearing to prove his debt; gives up the fecurities he had received from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full fatisfaction of his whole demand. Is that againft confcience? Is it not on the contrary a fair confideration for the note in queftion? He might forefee profpects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then, he could get nothing by the mere imprifonment of his perfon. He ufes no threats, no menace, no oppreffion, no undue influence; but the propofal firft moves from, and is the bankrupt's own voluntary requeft. The fingle queftion then is, Whether it is poffible for the bankrupt in part or for the whole, to revive the old debt? As to that, Mr. Juftice *Afton* has fuggefted to me the authority of *Bailey* v. *Dillon*, where the court would not hold to fpecial bail, but thought reviving the old debt was a good confideration. The two cafes cited by Mr. *Buller* are very material. *Lewis* v. *Chafe*, 1 *P. Wms.* 620. is much ftronger than this; for that fmelt of the *certificate*; and the Lord Chancellor's reafoning goes fully to the prefent queftion. Then the cafe of *Barnardifton* v. *Coupland*, in *C. B.* is in point. Lord Chief Juftice *Willes* there fays, "that the *revival of an old debt* is a *fufficient confideration*." That determines the whole cafe. Therefore I am of opinion, that if the plea put in had been *formally* pleaded, the merits of the cafe would not have been fufficient to bar the plaintiff's demand.

TRUEMAN *verfus* FENTON.

ASTON Juftice.—As a cafe of confcience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waves his right to come in under the commiffion, it is a benefit to the reft of the creditors. In the cafe of *Bailey* verfus *Dillon*, the court on the laft day of the term were of opinion, "that the "defendant could not be held to fpecial bail; yet they would "not fay that he might not revive the old debt which was clearly "due in confcience."—A bankrupt may be, and is held to be difcharged by his certificate from all debts due at the time of the

the commission: But still he may make himself liable by a new promise. If he could not, the provision in the stat. 5 *Geo.* 2. *c.* 30. *sect.* 11. by which *every security* for the *payment of any debt* due *before* the party became bankrupt, as a *consideration* to a creditor *to sign his certificate*, is made *void*, would be totally nugatory.—Lord *Mansfield* added that this observation was extremely forcible and strong. 1777. TRUEMAN *versus* FENTON.

Per Cur. Judgment for the plaintiff.

REX *versus* Churchwardens of ANDOVER.

Wednesday, Jan. 29th. *Aston*, J. absent.

If upon removal of an order of sessions adjudging that certain persons ought to be added to a poor-rate, and ordering the rate to be amended accordingly, the sessions omit to state that such persons had notice or appeared and where heard on the appeal, it is fatal. *Quære* whether *personal* property is rateable to the poor.

UPON shewing cause why an order of sessions amending a rate for the relief of the poor of the parish of *Andover* should not be quashed, the order returned was in substance as follows:

Upon hearing the appeal of *John Pollen* Esq; *William Sweet-apple*, *William Neale*, *William P[illegible]h use*, *John Carter*, *Stephen Holeway*, *John I[illegible]wood*, *Edward Pearce*, *Thomas Ba[illegible]s*, and *George Dewar*, Esq; against the rate made for the relief of the poor of the parish of *Andover* allowed the 21st of *July* last, complaining of their being aggrieved by such rate or assessment, this court is of opinion and doth adjudge, that Mr. *Joseph Wakeford* is the proprietor of *stock in trade* as a draper in the parish of *Andover* to the amount of three hundred pounds; and that the profits of such his trade are fifteen pounds *per annum*; and that he ought to be rated towards the relief of the poor of the parish of *Andover*, in respect of such stock and profits, seven pence each rate, in the rate appealed against.

The order then set forth an adjudication of the stock in trade and profits of six other persons in like manner; and how much each was to be rated in respect thereof, and then proceeded as follows:

And in order to give relief to such appellants in the premises, this court does order the said rate so appealed from to be *amended*, by putting into such rate, a rate on the said *Joseph Wakeford* of seven pence in respect of such his stock and profits; and on the said *J. Bunnery* of threepence halfpenny in respect of such his stock and profits; on the said *Mary Smith* of twopence halfpenny in respect of such her stock in trade and profits; on the said *Jane Worgan* and *Benjamin Worgan* twopence halfpenny in respect of such their stock in trade and profits; on the said

1777. Rex *versus* Churchwardens of Andover.

said *William Reading* of twopence in respect of such his stock in trade and profits; on the said *Thomas Parry* of twopence in respect of such his stock in trade and profits; and on the said *Peter Parker* of three halfpence in respect of such his stock in trade and profits.

Then it set forth that at an adjournment of the said sessions the justices amended the same rate, &c. and set out the order of amendment *verbatim*.

Mr. *Wallace* and Mr. *Burrough* shewed cause. Mr. *Burrough*'s argument was as follows:

The question now to be decided was at rest for a great number of years: I believe it may be safely asserted that the whole kingdom was satisfied of the legality of including this species of property in rates for the relief of the poor, from the making of the statute of *Elizabeth* to the beginning of the present reign.

Some doubts have of late arisen; but whenever the subject has been agitated, the question has been unfairly stated; for it has ever been put in this manner, "Is personal property rateable "within the meaning of the stat. 43 *Eliz.*?" I have been frequently told that it is not rateable; because there are no such words in the statute. This is certainly true; and was I to ground my argument on the statute only, some difficulties might arise: But every day's observation convinces us, that if we cannot discover the full meaning of the legislature from the words of a statute, there are other sources from whence information may be drawn. I shall endeavour therefore from other sources, and from the expressions of the statute also, to prove, that the legislature meant (and have sufficiently declared their meaning) that every *inhabitant* should be assessed to rates for the relief of the poor; not in respect of his personal property, but his *personal ability*.

This mode of considering the question will obviate one great ground of argument which is urged by the possessor of stock in trade, "That as in early times the quantity of personal property "was very small, it was beneath the attention of the legislature, "and therefore it is to be presumed that the parliament did not "intend it should be rated."

The proposition I hope to maintain being that the inhabitant is liable in respect of his personal ability, the argument alluded to is inapplicable to the question; because if it were possible that a new species of property should arise, which could not be construed to be either real or personal property, the possessor

would

would still be liable to the charge; because such property would increase his ability. 1777.

Rex versus Churchwardens of Andover.

In order thoroughly to investigate the question, the first inquiry shall be, whether at the common law there was any method of raising sums for the relief of the poor. I conceive that the *inhabitants* of the parishes were at all times, previous to the passing the statutes on the subject, bound to provide for such of their body as were unable on account of infancy, sickness, and poverty, to maintain themselves; and that a rate made by the majority of such inhabitants would have been binding on the rest. It is laid down as clear law in 5 *Co.* 63. in the Chamberlain of *London*'s case, "that the inhabitants of a town, "without any custom, may make ordinances or by-laws for the "reparation of the church or a highway, or of any such thing which "is for the general good of the public: And, in such case, the "greater part shall bind the whole, *without* any *custom*. But if it "be for their own *private profit*, as for the well ordering of their "common of pasture or the like, *there, without custom* they *cannot* "make by-laws." In *Moore* 580. in the case of *Davenant* and *Hurdis*, *Coke*, who was then Attorney General, contended, that a by-law made by the company of merchant taylors was *bad*, because it was contrary to the nature of a by-law; for (he admitted) that a by law ought to be made in furtherance of the public good, and the better execution of the laws; and not in prejudice of the subject or for private gain. In *Hobart* 212. it is laid down, "that all the parishioners or townsmen of one pa-"rish or town may make by-laws; for they are by common law "(as it were) incorporate for some necessities both common and "peculiar to that distinct body, as for repairing their church or "the like." It is observable, that neither in those books or in any other that I have had recourse to, is it said that *rates* were ever in fact made for the purpose in question; but in all of them mention is particularly made of *by-laws* for repairing the church and highways. It is impossible to discover with certainty whether any rate was in early times made for this purpose or not. It is likely that none was made for a great number of years preceding the Reformation; and that for a plain reason: The poor met with support from another quarter. This accounts for the silence of the books on this head; but since the reason assigned for the legality of a by-law for the purpose of repairing a church or highway is, that it is for the *general good of the public*, I need not attempt to prove,

 that

1777. Rex versus Church-wardens of Andover.

that the feeding a starving infant, or restoring the sick to health, would have been more conducive to the general good, than the repairing a dirty road or rebuilding a church steeple: For it is from the lower class of people that our fleets have always been manned. The industry of the poor man has ever supplied the kingdom with the necessaries of life. I contend then, that a rate which would have been necessarily productive of great benefits to society would have been good at the common law. But it must be remembered that the *Mirror* tells us, that "at the common law "the poor were maintained by the parsons, vicars, and by the "parishioners;" and that this passage is expresly recognized by Mr. Justice *Foster* and Mr. Justice *Wilmot*, in *The King* versus *Loxdale*, 1 *Bur.* 450. who both agree in admitting it to have been the common law of this country.

This affords a very sufficient foundation for contending, that *inhabitants of parishes* might, before relief was given by statute, *have assembled*, and that a *rate* made by the *majority* would have been *binding on the rest*; because it would have been in furtherance of the public good and the better execution of the laws. Why then was not the common law enforced in the manner I have contended it might have been? The answer to this question is, that it is agreed by all who have thoroughly considered the matter, that from the early ages of Christianity to the æra of the Reformation, the poor were maintained partly by the church, partly by monasteries and religious houses; and where these provisions were defective, the rest was made up by voluntary contributions. *Shaw's Parish Law*, 135. 1 *Nelson*, 49. 3 *Burn*, 273. 1 *Bur. Rep.* 223. I am well aware that a very learned gentleman, who has obliged the world with his observations on the ancient statutes, is of a different opinion *. In his observations on the stat. 31 *Hen.* 8. *c.* 13. which vested in the crown the larger monasteries and confirmed the stat. 27 *Hen.* 8. *c.* 28. by which the lesser monasteries were granted to King *H.* 8th; there is a passage to this effect: "It is generally "supposed that the dissolution of the monasteries occasioned the "provision for the poor in the latter end of Queen *Elizabeth's* "reign, which I should much doubt. In the first place, I do not "find that great numbers of poor are subsisted by the monasteries "which continue still in the Roman Catholic countries. Dr. "*Ducarrel* informs us, that he paid a particular attention to this "point in the province of *Normandy*; and could not discover that "the poor had any very considerable charity or support from the

* *Barrington* on the statutes, 450.

religious

"religious houses. Besides this, the 43 *Eliz.* was near sixty years "after the dissolution; and if the poor, at any time, found the "difference, it must have been more considerably felt in the first "years after the statute took place."—When the learned writer penned this observation, it is clear that this circumstance must have escaped his notice; that the first statute for the relief of the poor passed in the same year in which the lesser monasteries were granted to *Hen.* 8. The legislature foresaw that great inconveniences would be felt by the poor at the moment their benefactors were deprived of their possessions: A law was therefore passed to obviate those inconveniences *. The passing the statute at this period seems beyond a doubt to have established the fact, that before the Reformation the poor were chiefly supported by the monasteries and other religious houses.

1777. REX *versus* Church-wardens of ANDOVER.

At the *common law* then, the poor were to be maintained by the *parson*, *vicar*, and *parishioners*; and if the stat. 27 *Hen.* 8. *c.* 25. had not made some provision for their support, the power in the inhabitants of making rates must have been executed.

The court will now expect that I should prove that the parishioner was liable to this charge in *respect of his personal ability*. In order to make out this point, I shall state to the court the resolution of the House of Commons in the year 1720, as to the right of election of members to serve in parliament, for the borough of *Dorchester*. The right of electing burgesses for that borough is by this resolution said to be "in the inhabitants of "the said borough *paying* to church and *poor* in respect of their "*personal estates*, and in such persons as pay to church and poor "in respect of their *real estates* within the borough."

The resolutions of the House of Commons in matters of election are binding authorities: they are expressly made so by parliament. This resolution does not create the right to vote, but is declaratory of a right that existed before; and which indeed existed before the earliest parliamentary provision for the relief of the poor.

It proves clearly then, that at the time when this right of voting accrued, the inhabitants of certain districts were rateable to the poor in respect of their personal estates. The franchise of voting in respect of such property could never have existed, unless the inhabitant had been assessable to the poor first. Before the Reformation then, when the first statute on the subject passed, the inhabitants of *Dorchester* were assessable to the relief of the poor for their *personal estates*.

* Stat. 27 *Hen.* 8. *c.* 25.

 In

1777.
Rex *versus* Church-wardens of Andover.

In the next place I contend, that the several statutes upon the subject were made in *confirmation* of the *common law*; and that as several of these statutes expresly threw the burthen on all who were able to contribute, they have explained what partly indeed wanted explanation; that all who were able to contribute were liable to the rate at common law, and that it was totally immaterial whether the ability of the inhabitant arose from the enjoyment of *real* or *personal* property.

I will now shortly state the several statutes from the Reformation to the 39 *Eliz.* which will, I apprehend, prove, that I have very sufficient grounds for considering them as confirmative of the common law. The first in order of time is, stat. 27 *H.* 8. *c.* 25. By this act parishes were to find and keep every aged poor and impotent person who was born or had dwelt three years within the same, by way of voluntary and charitable alms, to be gathered of the good Christian people within the parish on *Sundays* and other holidays. The 2d is stat. 1 *Ed.* 6. *c.* 3. *sect.* 14. which enacts, that lame, sore, and impotent persons were to be taken care of where they were born or had been most conversant for three years. It directs that cottages should be provided for them, at the costs of such places, and they were there to be relieved and cured by the devotion of good people.

The parliament, having at these periods in their memory the examples of the former proprietors of the religious houses who had voluntarily supported the poor, imagined it would be sufficient to recommend charity to the inhabitants of parishes, and supposed compulsive steps would not be necessary.

The next statute is the 5 & 6 *Ed.* 6. *c.* 2. which directs, "that every year, in *Witsun-week*, the minister and church-"wardens in every parish after service should appoint two in-"habitants to the office of collectors, who on the next *Sunday* "were to ask and demand of every man and woman, what they "were contented to give weekly; and if any person, being *able* "to further this charitable work, did obstinately refuse to give "towards the help of the poor, the minister was to exhort "him; and if not then persuaded, the bishop was to send for "him, and to take order for his reformation." If neither the exhortations of the minister, nor the persuasion of the bishop proved effectual, the bishop by the next stat. 5 *Eliz.* *c.* 3. was to bind the party refusing over to the sessions, where he was to be gently persuaded; and if he still continued obstinate, the justices, with the churchwardens or one of them, were to tax

him according to their discretions in a weekly sum; and on refusal to pay, he was to be committed to gaol. 1777.

There is not any thing in these laws from which it can be inferred that the charge was intended to be limited to persons of any other description than that of "*inhabitants able to contribute.*" The three last were repealed by 14 *Eliz. c.* 5. which enacts "that justices of the peace, in their division, should tax all "and every *inhabitant* in every place known; they were to appoint "collectors and overseers; and if any person able to further this "charitable work obstinately refused to give, he was to be brought "before the justices to shew the cause of his refusal; and if he "did not obey their order they were to commit him to gaol, until he was contented with it." This statute was defective in one particular; it did not give authority to the overseers to raise a stock for the employment of such poor as could not find work. The stat. 18 *Eliz. c.* 3. therefore directed, that in all places where the justices in *Easter* sessions should think meet, there should be provided, of all the inhabitants to be taxed and gathered, a competent stock of wool and other things as the country is most meet for.

Rex *versus* Church-wardens of Anbovia.

The two last statutes 14 & 18 *Eliz.* were the last that were in force before the passing the 39 *Eliz.* and it is material to observe, that though a rate on any *inhabitant*, in respect of any property which created ability, would have been good; yet that a rate on a mere *occupier of land*, who was *not* also an *inhabitant*, would have been *illegal*; because both these statutes confined the charge to *inhabitants only*. I must observe here also, that there is not the least ground for contending that the parliament meant to confine the charge to inhabitants who possessed any particular species of property. Whether *visibly able* or not, was the only matter to be attended to. And it was as much in the power of the parish officer then, as it is now, to discover a man's ability when it arose from *personal* property, as when it arose from real property.

I shall now endeavour to convince the court, that all, who were assessable under these laws, were assessable also under the stat. 39 *Eliz.* and still continue to be so under stat. 43 *Eliz.* The legislature did indeed, by the first of those statutes, make the occupier of land, who was not also an inhabitant, liable to contribute— and he continues to be so under the latter of them. If it was not clear beyond a possibility of contradiction, that the parliament

by

1777.

REX *versus* Church-wardens of ANDOVER.

by these and the former statutes meant that *general ability* was to be the *guide* to the overseers in framing their rates; I might fairly contend that the parliament would in the stat. 39 and 43 *Eliz.* have dropped the term *inhabitant* It is of no use, if the persons are to be rated only in respect of the land; for the word "*occupier*" includes every possible case. The stat. 39 *Eliz.* then, first made the occupier liable. The idea of ability was still retained; the act declared that the necessary sums should be raised "by taxation of every *inhabitant and of every occupier of lands* in "the parish, to be gathered out of the same parish according to "the *ability of the* same." The parliament had undoubtedly before them the former laws: They perceived that it was in the power of a crafty landholder to exempt himself from the charge, by living out of the parish; they meant therefore to relieve the inhabitants, by introducing other persons who in justice ought to share the burthen, because they had been benefited by the labour of those persons for whose relief parochial rates were made. Under this law the *inhabitant* was rateable for his *personal ability*; the *occupier* for his *land*.

In the construction of statutes made in *pari materiâ* the law says, that though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.—Whilst I was reflecting on this rule, it occurred to me that in order to discover the full meaning of the stat. 43 *Eliz.* it would be necessary (after having found out how the law preceding that statute stood) to procure answers to these questions. Was there any doubt of the meaning of that law? Was it expired? Does any thing intervene to shew that an alteration was designed? Is there any preamble to the 43 *Eliz. c.* 2. reciting the inconvenience of the former laws? Are there words in the enacting branch of the new law manifestly contrary to, and subversive of, the old? The answers to these questions dispelled all my doubts. The meaning of the former law was plain. The statute was expired. Nothing intervenes to shew that an alteration was designed. There is not any preamble reciting the inconvenience of the former laws, nor are there any words in the *new* law contrary to, or subversive of the *old*. What then is the legal consequence? Courts of Justice must pronounce that the parliament meant only to revive the old law: Consequently the new law must have the same construction: And if a rate under the stat. 39 *Eliz.* would have been good upon an *inhabitant* in respect of his *personal ability*, it is clearly good under the stat. 43 *Eliz.*—On the

expiration

expiration of the ſtat. 39 *Eliz.* the parliament paſſed the law on which the queſtion ariſes. If this doubt had been ſtarted whilſt the former of theſe ſtatutes was in force, the court could not have avoided giving judgment in favour of the landholders. If I am right in this point, the landholders are now ſecure of a deciſion in their favour: Becauſe the two laws in every material circumſtance are ſimilar. The title of the two laws is the ſame; they begin with the ſame words. If the parliament had deſigned to impoſe the whole burthen on the occupiers of the ſeveral ſpecies of property enumerated in the ſtat. 43 *Eliz. c.* 2. and to have exempted the inhabitant, there would have been a preamble reciting the inconvenience of the former law, which would have ſaid, that the perſonal ability of each inhabitant was not diſcoverable: but as the parliament did not mean to make any alteration in this reſpect, nothing of this kind is to be found in the ſtatute. All who read the two laws muſt agree with Dr. *Burn*, "that the ſtat. 43 *Eliz.* is but a re enacting of former pro-" viſions with very little alteration." 3 *Burn.* 479.—*Hiſt. Poor Laws* 91. By the ſtat. 43 *Eliz.* the rate is to be made by taxation of every inhabitant, parſon, vicar, and other, and of every occupier of lands, houſes, tithes impropriate, propriations of tithes, coalmines, or ſaleable underwoods. Some few words are added after the word "lands," which perhaps were not neceſſary, as the word land is of a very extenſive ſignification, and would have compriſed almoſt all (if not all) the property ſpecified by thoſe additional words. Near the end of the firſt ſection is introduced the idea of ability, which was uſed in the ſtatutes preceding the 39 *Eliz.* and in every one of them confined to the word inhabitant. The tax is to be gathered out of the pariſh according to the ability of the ſame pariſh. Theſe words having been in all the former laws coupled to the term inhabitant, muſt be conſtrued as referring to, and explanatory of that word in the preſent ſtatute. At the moſt, it can only be uſed in the conſtruction of inhabitants, parſon, vicar, and others; becauſe the words "occupiers of lands, houſes, &c." of themſelves authoriſe a rate on the occupier, for the value of that property: The ſubſequent words therefore have no force if uſed as explanatory of the ſecond branch of the ſentence; but they explain the former branch to mean *this*; the inhabitant ſhall be rated according to his ability, when the property which creates that ability is locally ſituate within the pariſh.

1777. REX *verſus* Church-wardens of ANDOVER.

It is ſettled that an act of parliament muſt if poſſible be ſo conſtrued, as to give every part ſome effect; becauſe the legiſlature cannot

1777. cannot be supposed to have used unnecessary words. If the statute be construed in the way I contend it ought to be, every part will have some effect; if otherwise, the words I have now endeavoured to explain are not of the least use.

Rex *versus* Church-wardens of Andover.

The statute 43 *Eliz.* is misprinted both in the *Poor Laws*, and I believe in other books. They have it in this manner, "every "inhabitant, parson, vicar and other, and of every *other* oc-"cupier of lands," &c.; but in *Rastall*, *Ruffhead*, *Pickering* and *Cay*, the words are, "every inhabitant, parson, vicar, and other, "and of every *occupier* of land, &c." But for the sake of the argument, I beg to consider, how the stat. 43 *Eliz.* ought to have been construed if it had introduced a new law. And here it is clear, that the presumption ought to be that the parliament intended to throw the burthen on those who in justice ought to bear it. Who then are these persons? The clergy, the farmer, the manufacturer, the tradesman, and indeed every other person who is indebted to the poor man for his labour, and is of ability to make some return for it.

It must be presumed that the legislature of this country, whenever they impose a charge on the people, are directed by the well known rule of the common law, *qui sentiunt commodum sentire debent et onus*. The burthen ought in the case now under consideration to be general; the expressions of the statute extend to, and fairly justify a rate on the persons of all who reap this advantage, provided the property, in respect of which the person is taxed, lies *within the parish* in which the proprietor lives.

It will be very material in this part of the argument to shew, that the parliament so long ago as the year 1670. 22 *Car.* 2. thought personal property liable to this charge within the stat. 43 of *Eliz.* By the stat. 22 *Car.* 2. *c.* 12. called an additional act for the better repairing of highways and bridges, *sect.* 10. it is enacted, "that where the justices of the peace at "their quarter sessions shall be fully satisfied that the common "highways, causeways, or bridges, cannot be sufficiently "amended by means of the laws now in force, without the help "of that act, in all such cases one or more assessment or assess-"ments upon all and every the *inhabitants*, owners, and *occupiers* "of lands, houses, tenements, and hereditaments, or *any personal* "*estate* USUALLY *rateable to the poor* within any such parish, "shall be made, levied, collected, and allowed, by such persons "and in such manner as the justices in sessions should think "meet."

Inde-

Independent of authorities, I conceive that a rate on the personal ability of the inhabitant, is within the words and meaning of the stat. 43 *Eliz.* But if the court has any doubt of the construction of the statute when considered by itself, without attention to the authorities; yet no doubt can remain after a serious consideration of the cases and opinions to be found in the books. The first in order of time is the answer to the 18th question in the resolutions mentioned in *Dalton:* The answer expresly says, "that the *personal visible ability* of the inhabitant "may be rated." Some one has endeavoured to destroy the authority of these resolutions by prefixing a note to them; in which it is said, that though they were the opinion of Sir *Robert Heath*, yet the judges differing from Sir *Robert* in some things, they never came to a resolution. This note I apprehend does not deserve any attention; because the resolutions are expresly recognized by *Hutton* and *Croke*, in Sir *Anthony Earby*'s case, 2 *Bulſ.* 254. These judges could not be mistaken; for it appears in *Digdale's Chronica Series*, page 104 & 108. that Sir *Robert Heath* was made judge in 1628, and *Hutton* in 1617. They were both on the bench when Sir *Robert* submitted his opinion to the twelve judges, and they both expresly say (and they could not be mistaken) "that the twelve judges agreed "to the resolutions." In Sir *Anthony Earby*'s case, *Hutton* and *Croke* determine a case submitted to them on the authority of these resolutions, and they both agree in saying "that the as"sessments for the relief of the poor ought to be made according "to their *visible estate real and personal.*" *Dalton* was of the same opinion also, as appears in his *Justice*, c 73. *page* 165 & 185. He says, "the most reasonable way of taxing land is ac"cording to the pound rate; and where a personal estate, as "goods, money, &c. are taxed, it ought to be in the same pro"portion as the lands, *viz.* the value of 100*l.* at 5 *per cent.*" The next case is the *King* and St. *Leonard's, Shoreditch*, 10 *W.* 3. *Salk.* 483. 12 *Mod.* 212. *p.* 21. This is a decision in point. And though the court should think that the resolution of the twelve judges in *Dalton*, the opinion of *Hutton* and *Croke* on Sir *Anthony Earby*'s case, and the opinion of *Dalton* also ought not to have weight in this decision, still this case is free from every objection. The court of *King's Bench*, after argument on this question, determined, that *personal* property was assessable. There had been two rates made in this case; in the first the overseers had *omitted* to rate *personal* property: On appeal to the

sessions

1777.

Rex *versus* Churchwardens of Andover.

1777. seſſions the rate was for that reaſon *quaſhed*, and a new rate ordered on real and *perſonal* eſtates. The court of *King's Bench* confirmed that order. As to the ſecond rate, which was made in conſequence of the order of ſeſſions, the churchwardens had in it taxed real eſtate ten times more in proportion than perſonal eſtate. On appeal to the ſeſſions, the ſeſſions quaſhed this rate likewiſe, and the court of *King's Bench* confirmed this order alſo. In the *Queen* and *Barkin*, 2 *Ld. Raym.* 1280. three judges of the court of *King's Bench*, on a queſtion ſubmitted to that court, were of opinion, that a farmer for his ſtock was not taxable. Lord *Holt* thought he was; but they all agreed in the only point material to this queſtion, that a tradeſman was rateable for his ſtock. Lord *Hale*, who had well conſidered the ſubject, in his ſcheme for the relief of the poor ſays, "it is very plain that ſtocks are as well by law rateable "as lands, both to the relief and raiſing a ſtock for the poor." In *The King* v. *Clerkenwell*, *Foley* 23. *Hil.* 2 *G.* 1. an order confirming a poor rate which was made according to the land-tax was quaſhed, ſuch taxation being unequal; becauſe perſonal eſtate in the public funds is not chargeable to the land-tax, tho' it is to the poor.

REX *verſus* Churchwardens of ANDOVER.

To theſe determinations and opinions may be added the ſentiments of all the writers on the poor laws. They uniformly agree in admitting perſonal property to be liable to the charge. 2 *Nelſ.* 53. 2 *Shaw's Juſtice* 149, 152. *Shaw's Pariſh Law* 243. 248. Dr. *Burn*, 3d vol. 481. In *Viner's Abridgment*, tit. Poor, E. 8. there are ſeveral notes to this purpoſe; "a ſhop-keeper "ſhall be charged to the poor-rates for the goods in his ſhop."

Within a few years ſeveral attempts have been made to obtain the deciſion of this court on this ſubject: But it has unfortunately happened, that the queſtion has not been fairly before the court in any one of the caſes from the ſeſſions. This was the fate of *The King* v. *Canterbury*, *The King* v. *Whitney*, and *The King* v. *Ringwood*.* In the firſt of theſe, which is in 4 *Burr.* 2293, Mr. Juſtice *Aſton* is reported to have doubted on the ſubject, and to have ſaid, it was odd that ever ſince the cauſe in *Bulſtrode*, which was above 140 years ago, the rule ſaid to be then ſettled ſhould never have been carried into execution. But it is a fact, that for a long time perſonal property has been rated in the pariſh of *Andover*, from whence this queſtion comes. In many other parts of the kingdom the ſame practice has prevailed; at *Alton* in *Hampſhire*, at *Lynn*, *Norwich*, in many

* *Supra*, 326.

pariſhes

parishes in the city of *London*, at *Bradford*, *Trowbridge*, *Warminster*, *Frome*, and o-her Towns in *Wiltshire*. I am told likewise that it is the same in many of the large towns in the North. In 4 *Burr*. 2295, the reporter mentions the case of *The King* versus *The churchwardens and overseers of Ringwood*; and he says, " that this question was pretty nearly, if not quite settled " by that case."—But this is a mistake; for that case turned on the determination in *The King* v. *Whitney*; the sessions had quashed, where they ought to have amended the rate according to the directions of stat. 17 *Geo*. 2.

1777.

REX *versus* Churchwardens of ANDOVER.

As to the difficulties which it is said will attend the rating this property, and the inconveniences which it is supposed will ensue from a determination in favour of the landholders; namely, that the overseers cannot know what property a man has, or what is the yearly produce of such property: the answer is that those are inquiries not to be made here; they are mere matters of fact, and must be determined below. In the present case, the appellants have satisfied the justices that the several persons whose names are added to the rate, did possess certain quantities of property; and that they had the moderate yearly profit of five *per cent.* upon it. It is frequently said, that an overseer cannot justify entering the house of a tradesman, nor can insist on seeing his books, for the purpose of discovering his ability to contribute. I admit that no express authority is given by the statute, nor was there any whilst the former laws were in force; but then it must on the other hand be admitted, that no authority is given by that act, nor had the overseers any power under the old law, to enter on the *land*, or to take any necessary step towards obtaining a knowledge of the value of the occupier's landed property. This argument therefore, if it has any effect, must prove that no tax whatever can be imposed either on the tradesman's profits, or on any one of the kinds of property enumerated in the act of parliament. How can the value of either lands or coal-mines be ascertained without an entry on the lands, &c.?

A second argument is, that no fair rate can be made without deducting debts. But this is begging the question; for the tradesman ought first to prove that the law intended debts should be deducted. Many of the opinions that have been stated today, say that the visible personal ability is to be rated: This seems to me to exclude debts. There is no decision that says, debts ought to be deducted. If the law be so, does it not extend

1777.

REX *verſus* Church-wardens of ANDOVER.

extend alſo to real property? Are not mortgages to be deducted? I cannot ſee why there ſhould be all this anxiety for the tradeſman, and no attention to the caſe of the landholders. Whether the debts are to be deducted or not, is immaterial to the deciſion of the preſent caſe; becauſe in this order, which I conceive we are bound to adhere to as much as a ſpecial verdict, the profits are found to be 5 *per cent*: and profit means a clear ſum after deducting all charges. Since then, according to this mode of reaſoning, neither the value of land or perſonal property can be aſcertained with certainty; it will be neceſſary to conſider, how it has happened that any proviſion has been made for the poor, and why all mankind have ſubmitted and from time to time paid their ſhares of the aſſeſſments. The overſeers and the inhabitants have proceeded amicably; and that for this reaſon; unleſs they had done ſo, the poor muſt have ſtarved.

It is probable that in early times they aſſembled in veſtry, and agreed what each individual's portion of the charge ſhould be. It will be ſaid perhaps that this being once done, as far as it concerned land, it might ever after be uſed as evidence of value:—This is no anſwer; becauſe lands muſt be rated according to improvements. One man's land may continue in the ſame ſtate:—Another's may be worth one third more. Large tracts, which for a long period may have been in the occupation of one man, may by private conveyances be transferred to ten. How then can an overſeer know, what portion of this tract each of the ten occupies? Nothing could be done in ſuch a caſe, without admiſſions from the mouth of the occupier.—Theſe cannot be forced from him. The caſe I have now put is a very common one ſince the frequency of incloſing pariſhes. Lands, the value of which before was known, are, under incloſing acts, conveyed to different perſons. Large pariſhes, which for a century have been occupied by two or three farmers only, are divided amongſt a dozen proprietors. What method has the overſeer of diſcovering the value of each of theſe portions? It can only be done by the parties admitting them to be of ſome certain value. If the party is obſtinate, the overſeer muſt rate him at diſcretion: And why ſhould not the obſtinate tradeſman be liable to this inconvenience.

The moment the court has determined that the order of ſeſſions is right, the inhabitants of pariſhes muſt aſſemble, and by mutual conceſſions agree how the charge ſhall be divided. An honeſt man will never object to giving in a fair account of

his

1777.

Rex *versus* Church-wardens of Andover.

his property; others will perhaps be backward, and attempt to compel their neighbours to share what ought to come from their purses. If this should be so, the overseers must get the best information they can: And they will always (as the overseers in the present case have done) value the profits of their trade at a much lower sum, than in the opinion of every one they amount to. If any one thinks himself aggrieved by such a rate, he must appeal and satisfy the justices that he is injured. The justices have power to give him redress, and to order him his costs. On the other hand, a decision that this property is not rateable, will ruin the landholders in the populous towns in different parts of the kingdom. It will also deprive many of the people of *England* of the most valuable privilege they at present enjoy; that of saying who shall represent them in the House of Commons. In the borough of *Dorchester* this must necessarily be the case. It was the opinion of a very learned man, Lord *Vaughan*, that where the law is known and clear, though it be unequitable and inconvenient, the judges must determine as the law is, without regarding the unequitableness or inconveniency. Those defects, if they happen in the law, can only be remedied by parliament; therefore we find many statutes repealed, and laws abrogated by parliament as inconvenient, which, before such repeal or abrogation, were in the courts of law to be strictly observed. But where the law is doubtful, and not clear, the judges ought to interpret the law as is most consonant to equity, and least inconvenient.

In the present case the law is clear: but if it were not so, it still would be most consonant to equity, that all should contribute to the relief of the poor who are of ability to do so. I hope therefore that the order of sessions will be affirmed.

Mr. *Dunning contra*, objected that the order on the face of it was bad, inasmuch as it did not appear, that the several persons whose names were added to the rate by order of the quarter sessions, had *notice* of the appeal, or litigated the question at the sessions. They were therefore without redress; for it necessarily precluded them from their appeal. The sessions as to them made an original rate, without having given them an opportunity of defending themselves.

The Court held this to be a fatal objection; and therefore that the order of sessions ought to be quashed.

Lord *Mansfield*, upon the general point, said, it is a very different question, whether personal estate is to be rated to the

1777. *extent* in which it has been argued to day, or not to be rated at all in any ſhape, or under any circumſtances. It would make the poor laws very oppreſſive, if a man is to be taxed to the extent of his whole perſonal eſtate and income. In that caſe, every man who has money in the funds, would be liable: Lawyers for their fees; ſoldiers for their pay, &c. But where men are occupiers of houſes, and have ſtock in trade, whether ſuch ſtock in trade may be taken into conſideration is a very different queſtion. Some perſonal eſtate may be rateable: But it muſt be *local viſible* property *within* the *pariſh*. The general queſtion is too extravagant. It would be material to ſtate what has been the cuſtom of rating. If the uſage ſhould be to take in ſtock in trade, there would be very good right to ſupport it. Let them therefore try it on the ſpecial circumſtances of the caſe.

Rex *verſus* Church-wardens of Andover.

Aston Juſtice.—From the caſe in the 9th *Car.* 1. there are a great many which ſay that the local viſible property may be rated—but the queſtion is, how it muſt be done. Suppoſe it were done by the overſeers in the manner done here: if notice is given to the ſeveral perſons rated, and they think themſelves over-rated, they have an appeal to the ſeſſions. So if a houſe has been uſually rated for the houſe and ſtock in trade altogether; the rate is ſo ſpecified; and if the perſon has an objection, becauſe he is mounted too high, on an appeal, all that is a matter to be laid before the juſtices at ſeſſions, who act as jurymen with reſpect to the fact, and judges as to the deciſion. Then the immediate point ſpecified in the appeal is produced. For notwithſtanding the uſage, if upon the general queſtion, which is what they are now aiming at, it ſhould turn out to be the law that perſonal property is rateable, if that is the law, it muſt be rated then; though it never was ſo before. I ſhould think if the fact was fairly ſtated on an appeal, perſonal property, if by law rateable, might be called upon notwithſtanding the uſage.——*Per Cur.* Rule abſolute.

Tueſday, Feb. 4th.

Buller *verſus* Harriſon.

Mr. Juſtice *Aſton* abſent.

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Lord *Manſfield* read his report as follows:

If money be paid by miſtake to an agent, and placed by him to the account of his principal, but *not paid over*, money had and received to the uſe of the perſon ſo paying it by miſtake will lie againſt the agent.—The mere *paſſing* ſuch money in *account* or *making reſt*, without any new credit given, freſh bills accepted or further ſum advanced for the principal in conſequence of it, is not equivalent to a payment of it over.

This

This was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of 2,100*l.* paid him as due upon a policy of insurance, as *agent* for the insured, Messrs. *Ludlow* and *Shaw*, resident at *New York*. This sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on the 20th of *April*. Part of the money was paid at that time, and the remainder on the 6th of *May* following; on which day the defendant passed the whole sum in his account with Messrs. *Ludlow* and *Shaw*, and gave credit to them for it against a sum of 3,000 *l.* in which they stood indebted to him. On the 17th of *May*, notice was given by the plaintiff to the defendant that it was a foul loss. At this time, nothing had happened to alter the situation of the defendant, or to make it different from what it was on the 20th of *April*. He had accepted no fresh bills, advanced no sum of money, nor given any new credit to his principals; but affairs between them and him remained precisely in the same situation as on the 20th of *April*. The question at the trial was, whether this action could be maintained against the defendant, as *agent* of the insured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before stated, was equivalent to a payment of it over.

In general the principle of law is clear; that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it: because it is just, that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount. But the present case turns upon this; that the agent was precisely in the same situation at the time the mistake was discovered, as before. At the trial I inclined to think the plaintiff ought to recover; but did not direct the jury; and they found for the defendant. I am satisfied I mistook in leaving it open to the jury: For it is clearly a question of law, not a matter of fact: And in conscience the defendant is not en-

1777. titled to retain the money. Therefore I should have left it to the jury in this manner; if you are satisfied that the money was paid by mistake, and the defendant's situation not altered by any new circumstance since, but that every thing remained in the same state as it was on the 20th of *April*, you ought to find for the plaintiff.

BULLER *versus* HARRISON.

Mr. *Bearcroft* and Mr. *Davenport*, who shewed cause, insisted that the defendant had a right to retain the money in question. That the ship, which was the subject of insurance, was supposed to be sea-worthy; and the object of the voyage was to satisfy 2,100*l.* part of the debt due to the defendant, their factor. They had insured, therefore, accordingly, and drawn bills on *Holland* to that amount; which bills would undoubtedly have been honoured, if the ship had come safe. That upon the ship being lost, and the money due on the insurance coming into the defendant's hands; he had given his principals credit for so much on account, and had struck the balance. This by the verdict the jury clearly had considered as a *rest* in the books of the defendant, and not a mere placing to account; and therefore was to all intents and purposes equivalent to a payment over. As to the fact of there being no change in the situation of the defendant and his principals, because the debt was not increased, there was no necessity that it should be increased; or that any new credit should be given. It was sufficient that the money was fully carried to account by the defendant, and considered by him as his property at the time, and for eleven days after. It might be too, that under this idea he was lulled into security, and did not take any means during that interval, to get the money from *New York*. If so, he would at least be a sufferer by the delay, if the verdict should be set aside.

Mr. *Wallace* and Mr. *Dunning* were in support of the rule; but Lord *Mansfield* thought the case so clear, that his lordship stopped Mr. *Dunning*, as being unnecessary to give himself any trouble.

Lord MANSFIELD.—I am very glad this motion has been made: for I desire nothing so much as that all questions of mercantile law should be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is. The jury were embarrassed on the question whether this was a *payment over*. To many purposes it would be. It is now argued, that this is not a *mere placing* to *account*, but a *making rest*. If it were, it would not vary the case a straw.

I verily

1777.

BULLER *versus* HARRISON.

I verily believe the jury were entangled in confidering it as a payment over. There is no imputation upon a man who trufts to a mifreprefentation of the infured. It is greatly to his honour; but it makes it of confequence to him to know, how far his remedy goes if he is impofed upon. The whole queftion at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by miftake, he does no wrong; and the plaintiff muft call on the principal; And in the cafe of *Muilman* verfus ——, where it appeared that the money was paid over, the plaintiff was nonfuited. But, on the other hand, fhall a man, though innocent, gain by a miftake, or be in a better fituation than if the miftake had not happened? Certainly not. In this cafe, there was no new credit, no acceptance of new bills, no frefh goods bought or money advanced. In fhort, no alteration in the fituation which the defendant and his principals ftood in towards each other on the 20th of *April*. What then is the cafe? The defendant has trufted *Ludlow* and *Co.* and given them credit. He trafficks to the country where they live, and has agents there who know how to get the money back. The plaintiff is a ftranger to them and never heard of their names. Is it confcientious then, that the defendant fhould keep money which he has got by their mifreprefentation, and fhould fay, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to fay, whether any prejudice had happened to the defendant by means of this payment: But here no prejudice at all is proved, and none is to be inferred. Under thefe circumftance I think (and Mr. Juftice *Afton* with whom I have talked the matter over is of the fame opinion) that the defendant has no defence in point of law, and in point of equity and confcience he ought not to retain the money in queftion.

Mr. Juftice *Willes* and Mr. Juftice *Afhhurft* were of the fame opinion.

Per Cur. Rule for a new trial abfolute.

1777.

Same day.

EVANS *et al'* *versus* MANN.

Aston, Justice absent. *Assignees*, of a bankrupt, in *assumpsit* against the vendee of goods sold by the bankrupt *after* the commission, need not name themselves assignees in the declaration: *Secus*, if on a contract made by the bankrupt *before* the commission.

UPON shewing cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows: The single point saved in this case was, whether the plaintiffs, who are assignees under a commission of bankrupt against one —— a bankrupt, should have stated themselves to be assignees in the declaration. This was an action for *goods sold* and delivered: There were other counts for *money had and received*; and on an *account stated*. The case proved at the trial was, that the bankrupt some years after his bankruptcy, and before he had obtained his certificate, continued to carry on his trade as a lighterman, in buying and selling lighters; and amongst others sold a lighter to the defendant, who paid him 30 *l.* part of the purchase money at the time of the sale. Afterwards the plaintiffs, hearing of the sale, applied to the defendant, and insisted upon having the lighter delivered up to them, or the purchase money paid; but after some conversation it was agreed between them, that the defendant should keep the lighter, and pay the residue of the purchase money only to the plaintiffs, after deducting the 30 *l.* paid to the bankrupt; and for this residue the action was brought. At the trial, the counsel for the defendant objected, that the action could not be maintained; because the plaintiffs did not sue as assignees, nor state themselves as such in the declaration.—I overruled the objection; but gave the defendant leave to move for a new trial; and if the court should be of opinion that the objection was well founded, then a nonsuit was to be entered.

Mr. *Wallace* and Mr. *Buller*, who shewed cause, argued, that this being a contract to which the plaintiffs as assignees of the bankrupt were personally privy and parties, there was no occasion for them to state their title in the declaration; but they had a right to sue in their own names, as an executor or administrator, who is party to a contract relative to the goods of the deceased, may do.

Mr. *Dunning* and Mr. *Morgan* *contra*, contended, that the action being brought in right of the bankrupt, the plaintiffs ought to have set out their title in the declaration; otherwise the defendant could not know what answer to make to the action. Besides, it might be that he had a sett-off against the bankrupt;

bankrupt; which clearly could not have been pleaded to this action. As to an executor or administrator suing in his own right upon a contract relative to the goods of the deceased, the law was clearly settled, that wherever an executor sues in right of his testator, he must name himself executor; and cited 5 *Co.* 31. *F. N. B.* 119. *M. Cro. Car.* 225. 1 *Lev.* 250. *Regiftr. Brev.* 143. 2 *Stra.* 1,271. *Wilf.* 171. S. C. 1777. EVANS *versus* MANN.

Lord MANSFIELD.—This is an action for goods sold and delivered. The facts of the case are, that the bankrupt, after his bankruptcy, and before he had obtained his certificate, carried on his trade as a lighterman, and both built and sold lighters. He sold one to the defendant who paid him part of the purchase money: After which the assignees apply to the defendant for the value of the lighter; and so far affirm the contract as to enter into an agreement, by which they are content to be paid the residue of the purchase money, after deducting what the bankrupt had received: And for this residue they have brought the present action. The objection made is, that the declaration does not state them to be assignees.

On consideration there seems to be this distinction: If the assignees bring an action on a contract made by the bankrupt, *before* his bankruptcy, they must state themselves in the declaration to be assignees. But here the contract was after the bankruptcy, when the bankrupt could have no property of his own. The lighter was the property of the assignees; and consequently, the sale by him, a contract as their agent by operation of law, and on their account. Therefore it was not necessary that they should state themselves to be assignees in the declaration; though in respect of the evidence in support of the action, it might be incumbent on them to prove the trading, bankruptcy and so forth; in short, the whole of their case.

WILLES Justice.—I am of the same opinion. The sale by the bankrupt in this case can be considered in no other light than as agent or servant to the assignees.

ASHHURST Justice.—In the case of an action at the suit of an executor, it is clear, if the action be brought on a contract made by himself respecting the goods of the testator, he need not name himself executor. Therefore, I should doubt whether in this case it would be necessary for the plaintiffs to go into evidence of the trading, bankruptcy, &c. For here there was an actual treaty between the plaintiffs and the defendant relative to the matter in litigation; and not merely a promise by implication

1777. EVANS *versus* MANN.

of law. If so, the action is founded on an actual contract between the plaintiffs and the defendant: Consequently the plaintiffs are entitled to recover *suo jure*.

Lord *Mansfield* and Mr. Justice *Willes* both added that they were very clear on the last ground mentioned by Mr. Justice *Ashhurst*.

Per Cur. Rule for a new trial discharged.

Feb. 6th.

PIERSON *versus* DUNLOP *et al'*.

If the *indorsee* of a bill of exchange, who has received a *navy bill assigned* to the drawee, as a security to him (the indorsee) till the bill of exchange is accepted, deposit such navy bill with the drawee, and the drawee receive the money upon it; he is answerable for the amount in an action for money had and received to the use of the indorsee, tho' he may have done nothing that amounts to an acceptance of the bill of Exchange.—If the drawee of a bill of exchange says he cannot accept it *till stores* are paid for; it is an undertaking to accept *when* the stores are paid for.

UPON shewing cause why a new trial should not be granted in this case, the facts as they appeared by the report were as follow:

This was an action brought by the plaintiff against the defendants, as *acceptors* of a bill of exchange, drawn by *Robert Mac Lintot* upon them, for the sum of 300*l.* payable 15 days after sight to the order of *William Nichol* on account of freight, to be placed to account as *per* advice. The plaintiff was owner of a ship of which *Nichol* was the captain, and the bill was indorsed by him to the plaintiff. The ship was freighted with naval stores by *Mac Lintot*, who, being unable to discharge the freight, proposed to draw the above bill upon the defendants, and to give *Nichol* a *certificate* or navy bill, *assigned to the defendants*, as a *security till the bill of exchange was accepted*. *Nichol* after indorsing the bill of exchange sent it to the plaintiff together with a letter from *Mac Lintot* to the defendants, in which was inclosed the certificate, which *Mac Lintot* desired them to tender at the Navy-office, and at the same time *advised* them, he had *drawn* upon them for 300*l.* as above. On the 2d of *October* 1776, the plaintiff sent this letter with the certificate inclosed, and also the bill of exchange, to the defendants by one *Lightfoot*; who delivered them accordingly, and the *next* day called again for the bill of exchange. The defendants delivered it up, saying, "It "would *not be accepted till* the *navy bill was paid*." *Lightfoot* then demanded the navy bill, but they refused to return it, saying, "they would receive the money themselves." On this same day (the 3d of *October*) the defendants had written to *Mac Lintot*, acknowledging the receipt of his with the certificate inclosed; that they had delivered it to the Navy-office, and when the money was received they would advise him of it:—That his *bill would receive due honour*, but that it was drawn too

short

short, being made payable before the navy bill. There were *two* protests on the bill of exchange: *One* for non-acceptance, the ground of which was that the defendants would not accept *at present*, but would give an answer the *next day*, (*viz.* 4th of *October*) after post; the *other* was for non-payment, the defendants saying they had no advice. At the trial the counsel put the case of the plaintiff on *two* grounds. 1st, That the defendants' letter to *Mac Lintot* was an acceptance. But Lord *Mansfield* said, he rather thought it a letter of credit, and that, to make it an acceptance, it should have been sent to the *holder* of the bill. The next ground was, that the answer of the defendants to *Lightfoot*, saying, "They could *not* accept *till* the *navy bill was paid*," was a *conditional acceptance*: that the plaintiff had a *lien* on it, and therefore, as soon as they had received the money, they ought to have paid it to him. One of the special jury (Mr. *Gorman*) said, the letter of the 3d of *October* to *Mac Lintot* stuck with him; because, though it is an universal rule among merchants that a mere engagement to the drawer of the bill, is no engagement to the holder of it; yet here it was observable, that when the defendants wrote the letter of the 3d of *October* to *Mac Lintot* (the drawer), they had the bill, the certificate and the drawer's letter before them; that the navy bill was sent for the particular purpose of paying the bill of exchange, and that at that time they certainly meant so to apply it. The jury accordingly found a verdict for the *whole amount* of the bill in question. *N. B.* There were other counts in the declaration for *money had and received* to the plaintiff's use, &c. One ground of the motion for a new trial was, that the plaintiff had received 180 *l.* in part of payment of the bill of exchange from *Mac Lintot*: This was verified by affidavit; there had also been a proceeding in the *Exchequer* and an injunction granted.

1777. PIERSON *versus* DUNLOP.

Mr. *Dunning* in support of the rule contended, that this action could not be supported upon the ground of a supposed acceptance. That there was no evidence which bordered on the proof of an acceptance, except the letter from the defendants to *Mac Lintot*: But even *that* could be no acceptance so as to render them liable to the holder of the bill; being a transaction entirely between them and *Mac Lintot* the drawer; and subsequent to the indorsement of the bill to the plaintiff. That the verdict was clearly obtained on the second ground made at the trial; *viz.* that the plaintiff had parted with the navy certificate

1777. ficate on the faith of the bill being paid upon the security of it. If so, it was founded on a mistake; because the certificate was evidently of a nature that could not empower any body to receive the money but the defendants. Therefore, what the plaintiff parted with, was of no value; and if of no value, could not be a sufficient ground in law to raise an *assumpsit* on the part of the defendants.

PIERSON *versus* DUNLOP.

Mr. *Wallace contra* for the plaintiff insisted, 1st, That the declaration by the defendants, "that they could not accept the "bill *till* the *money* upon the *navy certificate was paid*," was an undertaking to accept it *then*. That the certificate was as money; and therefore, having *value* in their hands, there could be no doubt that they meant to accept the bill, though they afterwards refused to do so. *Secondly*, The plaintiff had a clear *lien* upon the certificate: for though he could not have received the money upon it, being made payable to the defendants, yet it was expressly given to him as *his security* till the bill was accepted. If so, the money received by the defendants upon it was money received to his use. Therefore, on either ground the plaintiff was entitled to recover. As to the plaintiff's having received 180*l.* from the drawer in part of the bill of exchange, that was no impediment to his resorting to the defendants for the residue. If the verdict therefore was for too much, the plaintiff was ready to remit the difference; but that was no ground for a new trial.

Lord MANSFIELD.—The counsel for the plaintiff have put this case two ways: 1*st*, That the conduct of the defendants was tantamount to an acceptance. 2*dly*, That the plaintiff had a *lien* on the navy certificate, and consequently a right to the money received upon it by the defendants, as so much money received to his use. The 1*st* question is, Whether, taking all subsequent discoveries into consideration, there is sufficient ground for the court to say the matter ought to be re-tried. 2*dly*, What is to be done in respect of the suppression on the part of the plaintiff, at the trial, of his having received 180*l.* from the drawer of the bill in question? As to the *first*, I am more strongly of opinion now than I was at the trial, that, upon the *merits*, the *verdict* is *right*. The grounds are two: And 1*st*, I consider what the defendants did, as an acceptance. It has been truly said as a *general rule*, that the mere answer of a merchant to the drawer of a bill, saying, "he will duly honour it," is no acceptance; unless accompanied with circumstances which

may

may induce a third perſon to take the bill by indorſement: But if there are any ſuch circumſtances, it may amount to an acceptance, though the anſwer be contained in a letter to the drawer. In this caſe, if it were neceſſary to go into the queſtion, there is great reaſon to ſay, that what the defendants did was equivalent to an acceptance. *Nichol* the captain had a *lien* on the naval ſtores for freight. He had likewiſe a certificate given into his poſſeſſion, as a pledge for the money till the bill of exchange was paid. This certificate was not ſent to the defendants by the poſt in the uſual courſe of trade, but was incloſed to the plaintiff as *his ſecurity*. He was not bound therefore to part with it till the bill was accepted. When the plaintiff tenders the bill for acceptance, the defendant tells him "it could not be accepted *till the ſtores were paid for*." There may be a *conditional*, as well as an *abſolute* acceptance. What then is this declaration by the defendant, but an undertaking that the bill ſhould be accepted, *when* the ſtores *were* paid for? After this, on the third of *October*, he writes to the drawer ſaying "he would honour the bill, but he ſhould not have drawn it at ſo ſhort a day, as it would be due before the ſtores were paid for." This is an admiſſion that he looked to the certificate as to the fund out of which the bill was to be paid. He is *then* called upon for payment; at which time he had actually received the money upon the certificate. But he refuſes to pay, and the only reaſon aſſigned is, "*the want of advice*." That is a falſe reaſon: for he had received advice; and had a fund in his hands out of which the bill was to be paid. But whether he had advice or not was immaterial. For here, the plaintiff had a lien on the certificate: And this certificate he depoſits in the hands of the defendant as a pledge for payment of the bill. Therefore, ſuppoſing for argument ſake, that the defendant at the time he received the certificate had done nothing which could amount to an acceptance, yet after he had actually received the money upon the certificate, he was bound to pay it to the plaintiff. Though the certificate was payable to the defendant, he could not have received the money upon it, if the plaintiff had not delivered it to him. Therefore, the plaintiff had from firſt to laſt a *lien* upon it.—The next queſtion is, What the court ought to do in conſequence of the ſuppreſſion on the part of the plaintiff? The actual arreſt of the drawer is no diſcharge of the acceptor: And I do not think the ſubſequent correſpondence, or any of the other circumſtances ſince, vary this caſe.

1777. case. But the verdict is certainly taken for 180 *l.* more than was due. There was no admission of this payment at the trial, which was very wrong; and has been the occasion of filing a bill in the *Exchequer*. Therefore there ought to be a deduction of the money received, and a proportionable part of the interest, together with all the costs in the *Exchequer* where this discovery was made.

Pierson *versus* Dunlop.

Aston Justice.—I am of the same opinion. I think this was clearly a *conditional* acceptance.

Per Cur.—Rule for a new trial discharged, upon the plaintiff remitting the sum of 180 *l.* together with the interest upon that sum from the time it was paid, and discharging the costs of the bill and answer in the *Exchequer*, and thereupon the defendant's bill in *Scacc.* to be dismissed.

Friday, Feb. 7th.

Sayre *et al' versus* Minns.

If to a plea of *performance generally* to an action on a sheriff's bond, the plaintiff reply a *particular warrant*, and that the defendant ought to have made due return, &c. but neglected, &c. he ought to conclude with a verification.

THIS was an action of debt upon bond brought by the plaintiffs, who were the sheriffs of *Middlesex*, against the defendant, a surety of *Joseph Stanhope*, one of their bailiffs. Upon *oyer* prayed of the bond and condition, it appeared the condition was for the performance of covenants in a certain deed of indenture bearing even date with the bond. The defendant pleaded, 1st, *Non est factum.* 2dly, A special plea, setting forth the indenture in the condition mentioned, and the several covenants therein agreed to be performed by the defendant, the affirmative of which (material to this question) were as follow: "That the said *Joseph Stanhope* should duly "and lawfully execute and serve all briefs, precepts, &c. directed "to the bailiff of the hundred of *Ossulston*, or to him the said "*Joseph Stanhope*, which should be tendered or come to the "hands of the said *Joseph Stanhope* to be executed or served; "and should make true return in writing, subscribed with his "own hand, of, to, or upon every such brief, &c. and should de-"liver the same, together with the returns, to the sheriff, &c. "on or before the day of return, &c. 2. And should receive "into his custody, the body of every prisoner whom the sheriff, "&c. should upon warrant tender to him, &c. 3. And should "when any goods or chattels by him seized or taken should be "sold, if the money should come to the hands of him the said "*Joseph Stanhope*, pay or cause the same to be paid to the under-"sheriff, his deputy or his clerk. And also in case any debt,

1777.

SAYRE *et al.* *versus* MINNS.

" damages, sum or sums of money whatsoever, should at any " time be recovered, adjudged or decreed against the plaintiffs " for the escape of any prisoner, *&c.* or for any other cause, " owing to the negligence or default of the said *Joseph Stanhope*, " he the said *Rowland Minns* should satisfy and exonerate the " plaintiffs from every such damage, *&c.*" The *plea*, as to the negative covenants in the indenture, was special, that the said *Joseph Stanhope* had *not* done, *&c.* in the words of each particular covenant. As to the affirmative, that the said *Joseph Stanhope* had performed them *generally*.—To this plea the plaintiffs *replied* a writ of *fi. fa.* issued on a judgment for 400 *l.* recovered against one *Charles Pigot* at the suit of *Lucy Groves*, widow, returnable in *Michaelmas* Term 1773. That on the 23d of *August* 1773, the writ was delivered to the then sheriffs of *Middlesex*, *Richard Oliver* and Sir *Watkin Lewes*. That they made their warrant in writing to *Joseph Stanhope*, which was duly delivered to him. That on the 28th of *September* 1773, *Oliver* and *Lewes* went out of office, and the plaintiffs came in, and that *Oliver* and *Lewis* did duly *turn over all writs*, *&c. remaining in their hands unexecuted.* That after the day of the return of the writ of *fi. fa. viz.* on the 10th of *November* 1773, a rule was served on the plaintiffs to return the said writ, of which the said *Joseph Stanhope* had notice, and ought to have made a true and lawful return thereto; but he wholly neglected to do so; by reason whereof a writ of attachment issued against the plaintiffs on the 5th of *February* 1774, and they were obliged to pay the said *Lucy Groves* 200 *l.* *&c.* of which premisses the defendant afterwards had notice, yet had not exonerated the plaintiffs, contrary to the form of the said indenture; and this they prayed *might be inquired of by the country*, *&c.*—There was a *second* replication setting forth another writ of *fi. fa.* issued in *Hilary* Term 1774, upon a judgment recovered by one *John Gloag* returnable on *Saturday* next after eight days of the purification; indorsed to levy 83 *l.* besides sheriffs' fees, *&c.* and delivered so indorsed on the 2d of *February* to the plaintiffs to be executed; *by virtue of which writ and of a warrant thereupon made* by the plaintiffs, and before the return, *&c.* divers goods and chattels of, *&c.* were seized and taken in execution by the said *Joseph Stanhope* as such bailiff, *&c.* and were sold for 61 *l.* 5 *s.* which said sum came to the hands of the said *J. S*: by reason whereof, the said *Joseph Stanhope ought forthwith to have paid or caused to be paid to the under-sheriff*, *&c. the said sum of money*, *&c.* And the said plaintiffs afterwards, on the 13th of *June* 1774, were

1777. SAYRE *et al.* *versus* MINNS.

were obliged to pay the said sum, of which the said *Rowland Minns* had notice; yet neither the said *J. S.* or *R. M.* had exonerated the plaintiffs, and this *they further pray may be inquired of by the country.*—To these replications the defendant *demurred*, and assigned several causes to each. As to the 1st, That it concludes to the *country*, when the same ought to have concluded with a *verification*. 2d, That it doth not appear any *warrant* was granted by the said *Stephen* and *William* upon the *fi. fa.* 3d, That it doth not appear that *Joseph Stanhope ought to have made any return* upon the warrant so granted. 4th, Or that the writ of *fi. fa.* was turned over by the late sheriffs to the plaintiffs.—As to the second replication: 1st, That it concludes to the *country*, &c. 2d, That it doth not appear *at what time* any warrant was made by the plaintiffs upon the writ of *fi. fa.* or *to whom* such warrant was directed. 3d, Nor is it alleged *by whom* the said goods and chattels supposed to be seized by *J. S. were sold*, or *to whom* the *money*, &c. was *paid.*

Mr. *Baldwin* in support of the demurrer, as to the first objection, insisted it was an established rule in pleading, that wherever new matter is introduced, it is necessary to conclude with an *averment*; that the opposite party may have an opportunity of answering such new matter. 2 *Bur.* 772, *Cornwallis* v. *Savery.*—*Weston* versus *Chapman*, 3 *Bur.* 1,725. the pleading in which latter case, he said, was precisely what it ought to have been in the present. "The plea was a plea of performance "generally. The replication set forth a *particular warrant*, al-"leging that the defendant had not made a due return to it, and "concluded with an *averment.* The defendant instead of demur-"ring as he would have done if the conclusion had been faulty, "took issue on the fact." So here, if the replication had concluded with an *averment*, the defendant might have denied the writ, and ought not to be precluded from doing so. As to the 2d, 3d, and 4th objections, he said, it did not appear that this particular warrant was turned over to the plaintiffs, but only, all *unexecuted* writs. Therefore, it might be that the defendant had executed this writ in the time of the late sheriffs and returned it to them. That the practice, where a writ sued out in *Trinity* Term and delivered in the vacation to the then sheriffs remains unexecuted at the expiration of their office, is, for them to turn it over to the new sheriffs, who make out a *fresh warrant* upon it directed to their *own officer.* That here, the covenant was, that *Stanhope* should make due return to all warrants *directed to him* by the *plaintiffs*; but no such warrant appears

pears to have been directed by *them*: Consequently he could not be bound to make any return to it: And therefore his sureties could not be responsible. 3 *Co.* 72. *Vin.* vol. 19. p. 453. E. a. *pl.* 3.

He observed in like manner upon the 2d and 3d objections to the 2d replication, that as it did not appear that *Stanhope* was the officer to whom the warrant was directed, or that the money was paid to him, the defendant was not answerable.

Mr. *Davenport* for the plaintiffs answered all the objections to the satisfaction of the court, except the first.

Lord MANSFIELD.—I take this to be a rule in pleading: That you cannot go to issue on a general averment of performance: And the reason is this; that the question may be brought to some degree of certainty, and notice given of what is to be agitated at the trial. When a particular breach is assigned, there is an affirmative offered on one side, upon which the other may take issue. But here there is a *general averment*; and no issue is offered by the replication. Therefore, upon this objection, I am of opinion with the defendant. Upon all the other points I am clearly with the plaintiffs.

Leave to amend.

THE END OF HILARY TERM.

EASTER TERM

17 GEORGE III. B. *R.* 1777.

Saturday, April 19th.

REX *versus* HARDY.

The court will not quash a poor-rate, unless it is unequal upon the face of it.

THIS came before the court upon a rule to shew cause, why an order of sessions, confirming a rate made by the churchwardens and overseers of the poor of the parish of St. *Clement* in the city of *Norwich*, in and by virtue of a private statute the 10 *Ann. c.* 6. intituled "an act for erecting a "workhouse and for the better employing the poor of the said "city," should not be quashed for inequality. The order of sessions, after stating that the defendant had appealed from the above rate, set forth a clause in the statute, by which a power is given to the governors and guardians of the said workhouse, to raise and assess certain sums weekly for the maintenance of the poor, on the respective inhabitants, and on every parson and vicar, and on all and every the occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and on all persons having and using stocks and *personal estates* in the respective parishes, towns, hamlets, or precincts within the said city, according to their several and respective values and estates. It then went on to state, that on hearing the appeal and reading the rate, it appeared, that the said *James Hardy* the appellant was rated or assessed towards the relief of the said poor within the said city, in the sum of 19 *l.* for his farm and lands within the said parish of St. *Clement*; and that such assessment of 19 *l.* was then by all parties admitted to be one full *moiety* or half part of his rack rent, or of the real yearly value of the said farm. And it was also admitted by all parties, that every occupier of lands and houses within the said parish were in *like manner equally* assessed by the said rate for their respective occupations, in

in the same proportion as the said *James Hardy*, or as near thereto as may be. And it also appeared, and was by all parties admitted, that the mode adopted and used in and by the same rate, for the assessing all persons within the said parish of St. *Clement* having and using *stock* and *personal estate*, or having money out at interest, was to rate and assess all such persons respectively, in the said parish, at and after the rate of one *twentieth part* of such stock and personal estate, or money out at interest, and to value the interest of such twentieth part at and after the rate of four *per cent. per ann.* and then to rate and assess one moiety of such twentieth part equally in that proportion or as near thereunto as may be. And it further appeared, that ever since the passing and commencement of the said act of parliament, lands, houses, tenements, stocks and personal estates, or money out at interest, of the respective inhabitants within the said parish of St. *Clement* have been constantly there assessed and rated to the poor rates of and for the same parish; and which rates have varied on the several assessments, according to the alterations of the circumstances of the inhabitants of the said parish. And it was thereupon moved by the counsel of the said *James Hardy* the appellant, that the rate aforesaid should be quashed for inequality. But this court upon due consideration of the whole of the premises, doth order that the rate aforesaid be, and the same is hereby ratified and confirmed.

1777. Rex *versus* Hardy.

Mr. *Wallace* and Mr. *Bearcroft* shewed cause.

Mr. *Dunning* and Mr. *Kenyon*, *contra*, in support of the rule for quashing the order of sessions, objected, that the rule of taxation laid down with respect to the assessment of real and personal property in this parish, was manifestly unequal. That real property being rated in the proportion of one full *moiety* of its yearly value, and personalty at only one *moiety* of a *twentieth part*, the burthen sustained by the land-holder was infinitely greater than that imposed upon the stock-holder; therefore the rate was unequal.

Lord MANSFIELD.—Unless we see that *upon the face of the rate*, it is *unequal*, we cannot interfere. Here the Justices have thought it equal, and I do not see any thing in the case that shews the party complaining is prejudiced.

ASTON, Justice.—If the rate does not appear to us to be unequal, we cannot quash it, and so it was held in *Rex* versus *Brograve*. 4 *Bur.* 2,491.

1777

REX *versus* HARDY.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* were of the same opinion.

Per Cur. Rule discharged.

Same day.

REX *versus* Inhabitants of CARDINGTON.

The grantee of the right of navigation of the river *Ouze* between *Erith* and *Bedford*, is rateable to the poor of the parish of *Cardington* in respect of the *tolls* arising from a *sluice* erected *there*; tho' he himself *resides elsewhere*, and the tolls are *collected* in *another* parish.

THIS case came before the court upon a rule to shew cause, why an order of sessions, quashing a rate or assessment made for the relief of the poor of the parish of *Cardington*, should not be quashed as to the assessment upon *Ashley Palmer* Esq. The special case stated by the order of sessions was as follows: That *Ashley Palmer* Esq; by virtue of letters patent, an act of parliament, and other legal conveyances, is seised in fee, of the right of navigation of that part of the river *Ouze*, which lies between *Erith* in the county of *Huntingdon* and the town of *Bedford*; and of all the *tolls*, sums of money and advantages arising and becoming payable for the carriage of coals and all other commodities whatsoever, upon that part of the navigation. That this part of the river was made navigable, for the public benefit, by the undertakers and proprietors, from whom Mr. *Palmer* claims, at a great expence; and is still attended with considerable charges. That by virtue of the said letters patent and act of parliament, the proprietors are impowered to take and *receive* certain *tolls* for the carriage of coals and other goods, and to *erect* certain *sluices* and staunches, for the better keeping up the water and carrying on the said navigation; and that the said *tolls* are paid for passing through every sluice and in a different rate, for different sluices. The several sluices have been long since erected on the said navigation; and in particular one sluice across the said river *in* the *parish of Cardington* in the county of *Bedford*, at which the toll is three pence *per* chaldron or load weight. That Mr. *Palmer*, does not *reside in* the parish of *Cardington*; nor has he any person resident at that sluice, to *receive the tolls*: But that the tolls for that sluice are received at *Barford* or *Eaton*; and the boatmen draw the wicket to pass. That neither Mr. *Palmer*, nor any of the former proprietors of this navigation, were assessed to the poor rates, for the sluices, or for the tolls or profits; though it has been navigable, and the tolls received, for upwards of an hundred years: But they have been for many years assessed to *Cardington land-tax*, and paid the following annual sums; 5 *l.* 13 *s.* 6 *d.*

when the land tax was four shillings in the pound, and 3 *l.* 13 *s.* 4 *d.* when three shillings in the pound; as appears from the assessment. That the parish of *Cardington* have lately assessed Mr. *Palmer* to the *poor's rates*, for the said sluices, in the sum of seven shillings and seven pence halfpenny, being a rate at three pence in the pound.

1777

Rex *versus* Inhabitants of Cardington.

This case was argued on *Tuesday* the 11th of *February* in last term, by Mr. *Bearcroft*, Mr. *Dunning*, and Mr. *Pemberton* against the rule, and by Mr. *Wallace* and Mr. *Whitchurch* in support of it *. Against the rule it was argued, That this species of property, *viz.* "tolls and other yearly profits," though expressly within the words of the land-tax acts, are clearly not within those of the stat. 43 *Eliz. c.* 2: Nor was it the intention of the legislature that they should be assessed to the relief of the poor. If it had been, the legislature would certainly have used the same words in both cases: Therefore the distinction manifestly shewed they meant to assess them to the one and not to the other. Besides, the value was so uncertain, that a fair rate could not be made. 2*dly*, Supposing it doubtful whether this species of property was meant to be included under the stat. 43 *El. c.* 2. the usage and practice ought to govern; and here the usage, from the time the navigation was first made, has been uniformly against their being rated. But further, Mr. *Palmer* does not reside, nor is the toll even *received within* the parish, but at *Barford* or *Eaton*. Consequently, if assessable at all, it must be assessed where received, and not to the parish of *Cardington*; and to this purpose was cited *Rex* versus *Rebow*, *Mich.* 12 *Geo.* 3. *B. R.* † as directly in point. If any distinction could be made between the two cases, it was, that the present was rather stronger than that; because there, two persons were constantly resident in the light-house; the tolls of which were the object of the rate. But here, neither Mr. *Palmer*, nor any body who could represent him resided in this parish.

† *Bott's Appendix*, 384.

In support of the rule it was contended that this species of property, though not expressly within the *words*, was clearly within the *meaning* of the stat. 43 *Eliz. c.* 2. That there could be no difference between these tolls and those of any other description; as the tolls of a market or the like; which were clearly assessable to the poor; and were so held in 3 *Keb.* 540. —As to the value being uncertain so is the value of tithes, coal-mines, &c. And even in lead-mines, though the adventurers

* Mr. Justice *Asten* was absent upon the argument.

are

1777. — REX *versus* Inhabitants of CARDINGTON.

are not rateable on account of the risque they run, the lord is for his share *. In the case of *Rex* versus *Rebow*, inquiry was directed to be made as to the tolls of bridges; when it appeared that *Fulham-bridge* tolls are taxed at the rate of 500 *l. per annum.* Why not assess these tolls as well as them? As to the objection of their not being *received within the parish*, they might be received there if Mr. *Palmer* chose? they are not *necessarily* payable elsewhere. But the material thing is, that they *arise within the parish*: The consideration for which they are paid, is the *passing* through the *sluice within the parish*; and if a boat went no farther, the toll would be equally payable. It is therefore *completely due within the parish.* The ground of decision in *Rebow*'s case was, that the vessels did *not* come within the parish: Therefore the tolls were *not due* there. But here they *do* arise, and *are due* within the parish.—The court upon this argument ordered the case to stand over to the present term, that inquiry might be made as to the *custom* of rating this description of property in other places.

Mr. *Dunning* now stated, that in answer to the inquiries made it appeared, that out of *fourteen* sluices, being the whole number erected upon this navigation, *one* only was rated to the poor. That the river *Ivel*, near *Bury*, the *Northampton* river, *Lark*, *Ouze*, and *Stower* were none of them taxed.—Mr. *Whitchurch contra*, stated that the tolls at *Marlow*, *Oxford*, *Reading*, and several others on the river *Thames* were all rated to the poor.

The court upon the whole thought these tolls were rateable; and therefore directed the rule for quashing the order of sessions to be made absolute, and affirmed the rate.

*Rawls v. Gells, *Easter*, 16 *Geo.* 3 *B. R.* *supra*, 451.

Tuesday, April 22d.

KENT *versus* BIRD.

Mr. Justice *Aston*, absent.

An agreement to pay 1000*l.* to the defendant at the next port a ship should reach, provided that if she did not save her passage to *China*, the defendant would pay to the plaintiff 1000*l.* at the end of one month after she arrived in the river *Thames*, without *reference* to *any property*, though one of the parties had *some goods* on board, liable to suffer by the loss of the season, is a wager... policy, within the stat. 19 *Geo.* 2 ...

UPON shewing cause why a new trial should not be granted, Lord *Mansfield* reported the case as follows:—This was an action brought by the plaintiff, who was a surgeon on board an *East Indiaman*, against the defendant, a passenger in the same ship, to recover a sum of 1000 *l.* upon a special agreement bearing date the 18th of *July* 1774; by which, after reciting that "whereas the plaintiff had agreed to pay to

1777.

KENT *versus* BIRD.

" the defendant the sum of 20 *l.* sterling at the next port the " ship should arrive at, it was witnessed that he the defend- " ant, in consideration thereof, did undertake that the said ship " should save her passage to *China* that season; and in case she " did not, then that he would pay to the plaintiff, the sum " of 1,000 *l.* at the end of one month after the arrival of the " said ship in the river *Thames*." At the trial it appeared that the plaintiff duly paid the amount of the 20 *l* to the defendant at the next port, in *pagodas*: That the vessel being delayed below the *Cape* and *Madras*, in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage. That the plaintiff had *some goods* on board which were liable to suffer by the loss of the season: And that whilst it was still doubtful whether the ship would or would not save her passage, the captain had applied to each of the parties, to persuade them to rescind the agreement; representing that the sum to be paid in either event, would be more than the loser could afford. That the plaintiff was willing to have cancelled the agreement, but the defendant positively refused. The jury found a verdict for the plaintiff, damages 980 *l*: But I gave the defendant leave to move for a new trial upon the question, whether this were not an agreement within the stat. 19 *Geo.* 2. *c.* 37. and therefore void.

Serjeant *Hill* and Mr. *Wallace* in support of the rule for a new trial argued, that the instrument in question was clearly in the nature of a gaming or wagering policy. That the words of the act are general, " that *all* assurances, interest or no interest, or " by way of *gaming* or *wagering*, shall be void;" and being intended to suppress fraud, should be construed liberally. That this was clearly a species of insurance, being made in terms against one of the risks which a common policy insures against; *viz.* that the ship would arrive within such a time in *China*. If so, it was undoubtedly within the intention of the act, being made without reference to any property on board, though the plaintiff had some little interest in the cargo.

Mr. *Mansfield* and Mr. *Buller contra* contended, that this was not a case within the words or mischief of the statute. That it was no insurance against the perils of the sea or loss of the ship or cargo, nor against any of the common risks in common policies; but merely an undertaking on the part of the defendant, that if the ship did not save her passage to *China*, he

1777. he would pay 1,000 *l.* upon her arrival in the river *Thames*. So far from being an insurance on the loss of the ship, if she had been lost, the defendant would have saved his money. For he was not to pay, except she lost her passage to *China*, and afterwards arrived safe in the river *Thames*. That if it resembled any thing, it was more in the nature of a *bottomree* contract. But to construe it an insurance, would be to make every wager against time a policy of insurance. Therefore they prayed the rule might be discharged.

KENT *versus* BIRD.

Lord MANSFIELD.—A policy of insurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the use of it was perverted by its being turned into a wager. To remedy this evil, the stat. 19 *Geo.* 2. *c.* 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and, amongst others, that of gaming or wagering under pretence of insuring vessels, *&c*; proceeds, under general words, to prohibit *all* contracts of assurance by way of *gaming* or *wagering*. Here the plaintiff gives so much to the defendant in consideration that the ship should save her passage to *China*; and if not, then, upon her returning safe to *England*, he is to receive 1,000*l*. If the first of these events happened, the defendant won; but he could not lose unless both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no interest in the case, it is gaming and wagering. Therefore the rule must be made absolute.

Lord *Mansfield* added, that it would be better for both parties to take it as a verdict for the defendant at the trial, without costs: And the judgment was entered up accordingly; and the premium returned.

MINORS *et al.* *versus* HOUGHTON.

Thursday, April 24th.

THIS was an action for a boat belonging to the plaintiffs, which was loaded with coals, and was navigated on the *Birmingham* canal; and was there seized and sold by the defendant, who was collector of the tolls and duties payable by boats navigating thereon. The cause was tried at the last assizes held for the county of *Warwick*, when a verdict was found for the plaintiffs, with 13 *l.* 14 *s.* 6 *d.* damages, and 40 *s.* costs, subject to the opinion of the court on the following case.

In

In stat. 8 *Geo.* 3. *c.* 38. for making and maintaining a navigable cut or canal from *Birmingham* to *Bilstone*, &c. is a clause for the more easy collecting the rates and duties by the said act directed to paid; "That the masters, owners and managers of every "boat, keel, and other vessel navigating, &c. shall *give a just* "*account in writing*, signed, &c. to the collectors, &c. of *what* "*quantities of goods* shall be in or belonging to each boat, &c. "from whence brought, and where they intend to land the "same: And if the goods contained in such boat shall be liable "to the payment of different tolls, then such master, owner, "or person shall specify the quantities liable to the payment of "each toll: And in case they *neglect or refuse to give such ac-*"*count, or* shall give a *false account*; *or* shall *deliver any part* of "their loading or goods *at any other place* or places than what "is or are mentioned in that account, they shall forfeit and pay "to the said company of proprietors, their successors and assigns, "the sum of *ten shillings* for *every ton of goods which shall be in* "*such boats* or vessels respectively, of which account shall be so "refused to be given, or of which *such false account shall be given*, "or which shall be delivered out as aforesaid, as the case shall "happen to be; over and above the respective rates and duties "they are obliged to pay for the same. And in case of neglect, "refusal, or denial of payment on demand of such forfeiture or "forfeitures beforementioned, or any part thereof, to the said "company of proprietors, their successors and assigns; that then "and in such cases the same shall be recovered and levied in "such manner and by such methods as the said tolls, rates and "duties are therein before directed and appointed to be recover-"ed and levied."

The plaintiffs were owners of the boat in question; which, at the time it was taken, was loaded with coals, and was navigated on the canal. The defendant is collector of the duties. The coals, by the rate of tonnage settled under the authority of the act, were liable to a tonnage of 1 *s.* 3 *d. per* ton; and were worth to be sold 2 *s. per* ton, exclusive of tonnage. The plaintiffs (or the persons having the command of this boat under them) delivered to the defendant as collector as aforesaid, an account, in writing, of the quantity of coals contained in the boat; in which account it is stated to be only *twenty-two* ton and *ten* hundred weight. On the same being weighed it appeared that the real weight thereof was *twenty-four* ton and *eight* hundred weight; whereupon the defendant seized the boat. On the boat being

1777. MINERS *versus* HOUGHTON. seized, the plaintiffs immediately tendered to the defendant the money admitted to be due for the tonnage of the whole quantity of coals, and also 20 *s.* as the penalty forfeited for reporting the weight of the coals to be *two* ton less than the real weight thereof; and demanded the boat: But the defendant refused to accept the money tendered, or to deliver the boat, insisting that the plaintiffs had forfeited *ten shillings a ton on the* WHOLE *quantity of coals* contained *in the boat*; and gave notice in writing to the plaintiffs, "that unless they paid ten shillings a ton for every ton of "coals contained in the boat, within five days he would sell "the boat, to levy that penalty." Upon the plaintiffs not complying with that demand, the defendant, after the end of five days, sold the boat, and, out of the money arising by the sale thereof, retained the amount of the freight for the coals, and ten shillings a ton for every ton of coals contained in the boat, and also the costs and charges of the seizure, distress and sale; and returned the overplus to the plaintiffs.—The question reserved for the opinion of the court was, Whether, upon the true construction of the above stated clause of the act, the plaintiffs had forfeited and were liable to pay the penalty of ten shillings a ton *only* upon the *difference* between the weight or quantity *given in*, and the *actual* weight and quantity contained in the boat; or upon the whole weight or quantity contained in the boat?

Mr. *Dayrell* for the plaintiffs argued, that upon the true construction of the statute, the single forfeiture of ten shillings *per* ton, could only be multiplied by the number of tons over and above the quantity given in, and not by the gross number of tons contained in the vessel. That this was apparent from the manner in which the penal part was worded: For instead of saying that "In case they shall neglect or refuse, &c. or shall give "*a false account*, or shall deliver, &c. that then, *in all* and in "*either* of those cases, they shall forfeit and pay ten shillings "for *every ton of goods which shall be in such boat*," and stopping there; the act goes on and says, "of which account shall be "refused, or of which such false account, &c." which latter words plainly shew the forfeiture is only to accrue upon the quantity not given in, &c: otherwise the repetition would have been fruitless. Besides, a different construction would make the forfeiture beyond measure severe and oppressive, and out of all proportion to the fraud intended to be suppressed.

Mr.

Mr. *Wheeler contra* contended, that upon the plain ſenſe and meaning of the ſtatute, the party offending in this caſe, was liable to the penalty of ten ſhillings *per ton* upon the *whole quantity* of goods contained in the boat. That here the forfeiture was incurred for not giving in a full account; therefore if falſe as to any part, it muſt be falſe in *toto*. That the words were expreſs; "Shall forfeit and pay ten ſhillings for *every* ton of goods, "which *ſhall be* in ſuch *boat*, of *which ſuch falſe account* ſhall "be given;" *not* "of which *no* account ſhall be given;" for that might have made it clearer the other way: but as it now ſtands, it is plain the forfeiture was to be according to the whole number of tons contained in the veſſel. But if there were any doubt, it was cleared up by the ſpecific weight to which the ſingle penalty was confined, *viz.* 10 *s.* for every ton; for if the penalty could only be levied upon the quantity not given in, there might always be 19 *cwt.* over the quantity given in, and no penalty at all incurred.

MINORS *verſus* HOUGHTON.

Cur. adviſare vult.

Afterwards, on *Monday, May* 12th, in this term, Lord *Mansfield* delivered the reſolution of the court * as follows:

We are all of opinion, that the penalty in this caſe ſhould not be ten ſhillings *per* ton upon the groſs weight or quantity of goods contained in the boat; but ten ſhillings *per* ton only upon the *difference* between the weight or quantity given in, and the actual weight or quantity contained in the boat. The conſequence is that there muſt be

Judgment for the *Plaintiffs.*

* *Aſhhurſt*, Juſtice abſent.

WARNER *et al. verſus* THEOBALD.

Tueſday, April 29th.

Riens in arrere is a good plea to an action of *debt* for *rent.*

IN debt for rent, the plaintiff declared upon an indenture of leaſe for 21 years, made between *William Watts* (who at the time of the indenture was poſſeſſed of the premiſes for the reſidue of a term of 61 years commencing in the year 1759) on the one part; and *James Gubbins* of the other part: The declaration ſtated the demiſe, the entry of *Gubbins*, &c. and that afterwards *Watts* ſold the reverſion to the plaintiffs. That ſubſequent to ſuch ſale of the reverſon, *all* the eſtate, &c. of *Gubbins* came by aſſignment to the defendant, who entered, &c. after which *half a year*'s rent, *viz.* 20 *l.* became due and in arrear. The defendant pleaded that "nothing of the rent *is* in ar-"rear and unpaid as by the declaration is above ſuppoſed." The plaintiffs

1777. plaintiffs demurred, and assigned for special cause: 1*st*, That it was not alleged that the rent was paid on the 24th of *June* 1776, or *when it became due*, or *when* the same was paid. 2d, That it did not allege, that the rent was paid *before* or *at the time of exhibiting the bill*, or that the same *was not then in arrear and unpaid*.

WARNER *versus* THEOBALD.

Mr. *Buller* for the plaintiff stated the question to be, Whether in debt for rent by an assignce against an assignee, the plea of *riens in arrere* was a good plea; and he insisted it was not. Because upon such a plea, it is impossible for the plaintiff to tell what it is the defendant means to insist on at the trial; whether he will deny the original lease, or any intermediate assignment; or whether he means to set up a payment *before* or *since* the action brought. For it only says "nothing *is* in arrear," which must relate to the time of the plea pleaded. But it might be in arrear *before*, and at the time of the action brought. Therefore, upon such a plea, *non constat when*, or how payment was made; or whether levied by distress, or released. Consequently the plaintiff is at a total loss what defence to prepare to meet. The only instance of a plea of this kind is in 1 *Brownlow* 19. *Hare* v. *Savile*; and there the court held it bad. It is true, that was an action of *covenant* for rent, but there is no difference in this case between *covenant* and *debt*.

Mr. *Wood contra* for the defendant said, the whole distinction was between *debt* and *covenant*. That in the *latter*, *riens in arrere* was clearly a bad plea, for the reason assigned in *Hare* v. *Savile*; "because it confesses the covenant to be broken, and "tends but in mitigation of damages." But *debt*, is to recover the specific sum due; and if that is paid, there can be no damages for the detention. It is essential that it should be due at the time of the action brought; and that is the only point for the defendant to answer. The form of the plea is, *nil debet*, in the *present* tense; which has reference to the time of the action brought. In covenant it is, *non infregit conventionem*, in the *past*. In *detinue*, the principle is the same: The plea is *non detinet*: The only difference is, that the one is to recover goods and chattels, the other money. But in this case *riens in arrere* is a fairer plea than *nil debet*: Because *nil debet* puts the whole declaration in issue; whereas, *this* confines the question to the single fact, "whether such rent was due." Yet *nil debet* would have been a good plea. *Hardr.* 332. 2 *Ld. Raym.* 1,503. *Bul. Ni. Pr.* 2*d. edit.* 170. Indeed, between *nil debet* and *riens in arrere*, there is no substantial difference. In *replevin*, the latter is the

constant

constant plea. So in debt and in annuity, which is in the nature of an action of debt.—As to the second objection, that the plea does not say the rent *was* in arrear at the time of the action brought, the answer is, that the plea relates to the time of bringing the action; therefore, whether alleged in the past or present tense, makes no difference: Because payment subsequent to the action brought could not be given in evidence. But if this were an objection, the subsequent words, "as by the declaration is "supposed," would cure it effectually. If not, it would apply to every plea of *non est factum*, *nil debet*, *non detinet*, *riens per discent*, &c. to every action in the *Common Pleas*, and to verdicts; all which run in the present tense. But various precedents of similar pleas are to be found in *Rastall* 175, 176. *Winch. Ent.* 10. *Placita generalia.* 106. and moreover, it is the constant practice.

1777. WARNER *versus* THEOBALD.

Mr. *Buller* in reply. The plea of *riens in arrere* is not a general issue; therefore the cases cited are not applicable. The words "as the declaration supposes" are in this case mere words of form; and do not go to the time when the rent became due. There is in substance no difference between this case and *Hare* v. *Savile*: Here, the allegation is, that the rent was due on the 24th of *June* 1776. That allegation is not answered by a plea which only says, "nothing *is* now in arrear:" Because that might be perfectly true, though it were confessed at the same time that the rent was due when the action was commenced. Therefore the plaintiff is entitled to judgment.

Lord MANSFIELD.—Mr. *Wood* has fully satisfied me. Nothing can be clearer than the present case. The declaration says, there is so much rent in arrear. The plea says, there is not. The saying there is nothing in arrear, is the same as if he had said *nil debet*; and it is absurd to suppose that it relates to the time of the plea, and not to the action. Besides it is a more favourable plea for the plaintiff; it is an answer to the action. The action is in the present tense: So is the plea. It is the general issue. If the rent *was* due, and *is* not at the time of the plea, it could not have ceased to be due, but by the plaintiff's accepting it: And if so, he waves the action, though it was well brought at the time.

Per Cur. Withdraw the demurrer on payment of costs.

1777.

Thursday, May 1st.

General declarations, or the answer of a *parent* in *Chancery*, are good evidence, after the death of such parent, *to prove that a child was born before marriage*; but *not*, to prove that a *child born in wedlock* is a *bastard*.

GOODRIGHT *ex dim.* STEVENS *versus* MOSS *et al.*

UPON shewing cause why a new trial should not be granted in this case, Mr. Justice *Willes* reported from Mr. Baron *Eyre* as follows:

This was an ejectment for two messuages, &c. demised by *Samuel Stevens* on the 1st of *March* 1776, for seven years. Plea, not guilty. Verdict for the plaintiff.

The lessor of the plaintiff claimed to be entitled to the premisses for which the ejectment was brought, as cousin and heir at law of *Ann Stevens*, who died seised. And the only question in the cause was, whether the lessor of the plaintiff was the *legitimate* son of *Francis* and *Mary Stevens*; or *was born of* Mary *before their marriage*.—For the plaintiff, the *register* of the *marriage* of *Francis Stevens* and *Mary Packer*, dated *November* 2d, 1703, and the *register* of the *birth* of the lessor of the plaintiff, in the following words, "Christenings 1704, *Samuel* son of "*Francis* and *Mary Stevens baptized July* 3d," were produced. It was insisted, on the part of the defendant, "that the lessor "of the plaintiff was *born and privately baptized before the marriage*, and that there was a *public baptism after the marriage*," which accounted for the register.—They first offered witnesses to *general declarations* by the *father* and *mother*, that *Samuel* the lessor of the plaintiff *was born before marriage*, which evidence Mr. Baron *Eyre* was of opinion to *reject*.—They also offered evidence, that there was a *general reputation* in the place, where the father and mother and *Samuel* resided, "that he was "born *before* marriage;" which Mr. Baron *Eyre* was likewise of opinion to reject.—They further offered to produce one *Joseph Dowsell* as a witness, to prove that he had *heard one Crips say* many times "that the lessor of the plaintiff was a baseborn child," which evidence was rejected: And lastly, they offered an answer of the *mother* of the lessor of the plaintiff to a *bill in the court of Chancery* by the committee of *Ann* a lunatic, the person last seised, against the lessor of the plaintiff and his mother; in which answer, the *mother declared him* to be *illegitimate*; that he was *born before marriage* and privately baptized; and again publicly baptized after the marriage: Which evidence Mr. Baron *Eyre* was also of opinion to *reject*. Whereupon a verdict passed for the plaintiff, subject to the opinion of the court upon these points of *evidence*.

Mr.

Mr. *Howarth* and Mr. *Jones* now ſhewed cauſe, and inſiſted, that though the teſtimony of parents in their life-time, or their declarations after their deceaſe, might be admiſſible in caſes where proof of the marriage was *preſumptive* only, as by *cohabitation*, or *general reputation*; yet neither their declarations, nor their perſonal teſtimony could be admitted to baſtardize their iſſue; where, as in this caſe, the fact of the marriage was actually proved. If ſo, the evidence offered was rightly rejected. In ſupport of this poſition they cited the following authorities. *Rex.* v. *Inhabitants of Reading*, *Mich.* 8 *Geo.* 2. *B. R. Caſes temp. Lord Hardwicke* 79. *Rex* verſus *Rook*, *Mich.* 26 *Geo.* 2. *B. R.* 1 *Wilſ.* 340. *Rex* v. *Inhabitants of St. Peter's Worceſter*. *Bur. Set. Caſ.* 25. *Rex* v. *Inhabitants of Stockland*, *Bur. Set. Caſ.* 506. 8 *Mod.* 180. *Code*, *Lib.* 2. *tit.* 4. *lex.* 26. *Lib.* 8. *tit.* 47. *lex.* 6. 9. 10. *Dig. lib.* 5. *tit.* 2. 27. *Lib.* 22. *tit.* 3. 29.

Lord MANSFIELD.—All the caſes cited, are caſes relative to children *born in wedlock*: And the law of *England* is clear, that the declarations of a father or mother, cannot be admitted to baſtardize the iſſue born after marriage. But here the evidence offered is only to prove the time *when the iſſue was born*; and to ſhew, whether it was *before* the marriage or *after*. The objection that is made to it goes a great way indeed; for it goes to this; that even if the father and mother were alive, their own teſtimony could not have been received.

Mr. *Wallace* and Mr. *Bower contra*, in ſupport of the rule, admitted the fact of the marriage, but nevertheleſs contended the evidence offered ought to have been received. That the legitimacy of the leſſor of the plaintiff did not depend, upon whether *F. Stevens* or a third perſon was his father, ſuppoſing him to be actually born in wedlock; but upon the fact, whether he *was* born in wedlock or *not*. That the regiſter, though evidence of his being the ſon of *M.* and *F.* was by no means *concluſive* as to the *time* of the *birth*. What then is the beſt evidence the nature of the thing will admit of? Moſt clearly the teſtimony of the parents themſelves, if alive; eſpecially, of the mother. If ſo, why are not her declarations to be received after her death. (Lord *Mansfield*. Suppoſe the father had entered the day or hour of the child's birth in a leaf of his Bible, would not that have been evidence? Moſt undoubtedly it would.) And though there are many diſtinctions in the books, as to how far an anſwer, or depoſitions in one ſuit, may, or may not, be read in another ſuit not between the ſame parties; the mother's anſwer in

Chancery

1777. Chancery is here offered only as a solemn declaration by her in her life-time. In questions of pedigree, declarations of persons of the family have been frequently admitted. Parents have been examined in court: And in *Rex* v. *Inhabitants of Reading* *, the mother was admitted to prove every thing but the want of access, though the child was born in wedlock. (Lord *Mansfield*. It was formerly held, that if the husband was within the four seas at the time the child was born, no evidence could be admitted to prove it was illegitimate; but that doctrine was overruled in the case of *Pendrel* v. *Pendrel* †; and from that time the law has been settled the other way ‡.)

GOODRIGHT *versus* MOSS.

* Cas. temp. Lord *Hardwicke*, 79.

† 2 Str. 925.

‡ 3 P. Wms. 276.

Lord MANSFIELD.—The *whole* of this evidence has been rejected. If *any part* of it ought to have been received that is *material*, there ought to be a new trial; and there can be no doubt of its being material.

This case has been argued at the bar with a greater latitude than I thought it could have been. *Two* questions have been made: 1st, Whether the *father* and *mother* could have been examined, if *alive*. 2dly, If they could, whether their declarations, though ever so solemn, can be admitted as evidence *after their death*. In this case there is evidence of the fact of the marriage. But there is no evidence of the time of the *birth*. The register only proves the Christening; but *non constat* from thence, when the child was born. As to the first question, I should as soon have expected to hear it disputed, whether the attesting witnesses to a bond could be admitted to prove the bond. I have known it done over and over again: And it is much too clear to admit of a doubt. In this court, at *nisi prius*, a mother was allowed to prove a clandestine marriage at the *Fleet*, and no other evidence was given, to shew the legitimacy of the child. A great estate was recovered upon her single testimony, and no objection whatever started as to the admissibility of it. In Lord *Valentia*'s case, in the House of Lords §, where the question was, Whether the Earl of *Anglesea* was married to the Countess *Dowager* of *Anglesea* on the 15th of *September* 1741, prior to the birth of Lord *Valentia* their son, who was born in the year 1744, the Countess *Dowager*, having no interest, was admitted as a witness to prove the fact of the marriage. In *Stapylton* v. *Stapylton* ‖, upon an issue to try whether the plaintiff was legitimate or not, the mother attended at *Guildhall* to prove he was illegitimate. But it happened that she had made an affidavit, in which she had sworn that she and her husband

§ Adjudged *April* 22d, 1771.

‖ About the year 1739. *Vide* 1 *Atk.* 4.

husband had been married long before the plaintiff was born; and this affidavit was intended to be used against her. Upon this fact being known, it was thought prudent not to call her: But there was not an idea on either side, that she was not a proper witness to the fact of the marriage.—As to the *time of the birth*, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy, that they shall not be permitted to say *after marriage*, that they have had *no connection*, and therefore that the offspring is spurious; more especially the mother, who is the offending party. That point was solemnly determined at the delegates. But the question of access or non-access is totally different from giving evidence of the time of the birth.—The next question is, Whether the declarations of the father and mother in their life-time, can be admitted in evidence after their death? Tradition is sufficient in point of pedigree: Circumstances may be proved: For instance: Suppose from the hour of one child's birth to the death of its parent, it had always been treated as illegitimate, and another introduced and considered as the heir of the family; that would be good evidence. An entry in a father's family bible, an inscription on a tombstone, a pedigree hung up in the family mansion (as the Duke of *Buckingham*'s was), are all good evidence. So the declarations of parents in their life-time. I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the *credit* of such declarations is impeached, it must be left to the jury to judge of. As to the declaration made by the mother of the present plaintiff, in her answer to the bill filed against her in the Court of *Chancery*, it is not like offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done for this reason; because such person has it not in his power to cross examine. But here the answer is offered only as evidence under her hand, of her having made such declaration. Therefore I am of opinion, that as *part* of the evidence, which was *material* in this case, and which ought to have been admitted, was rejected; there must be a new trial.

1777.

GOODRIGHT *versus* MOSS.

ASTON Justice.—I am of the same opinion. I think rejecting the general declarations of the father and mother was wrong: And here the declarations are not inconsistent with the register, but

1777. but are rather strengthened by it. For if the child was born after the marriage, the mother did not go above eight months.

GOODRIGHT versus MOSS.

WILLES, Justice.—I am of the same opinion.

Per Cur. Rule for a new trial absolute.

Same day. DENN *ex dim.* TARZWELL *versus* BARNARD.

UPON shewing cause why a new trial should not be granted in this case, Mr. Justice *Willes* reported from Mr. Baron *Hotham* as follows:—This was an ejectment tried at the last assizes at *Taunton*, in the county of *Somerset*, for certain premises in the parish of *Street*, which *Mary Tarzwell*, before her marriage with *Richard Skitter*, demised to the plaintiff: She claiming under an assignment from *William Tarzwell* the younger, who took under *the will of his father William Tarzwell* the elder. *Thomas Tottle* said, he knew *William Tarzwell* the son. That he had an house, orchard, and garden, at *Street*, which belonged to his mother before, who has been dead ten or eleven years. That *William* was in possession about *two* years ago: But how much longer he could not say. But one *Atwell*, who lived there above *ten* years ago, paid rent, *before* that time, to *William* for one end of the tenement: And *William* kept possession of the *orchard* ever since his mother's death. The *deed of assignment* from *William Tarzwell* and *Mary Tarzwell* dated the 26th of *February* 1771, was then read; by which, *William Tarzwell*, in consideration of *love and affection*, and for divers services done and performed by the said *Mary* for the said *William*, and also of the sum of *ten shillings*, assigned the premises to *Mary Tarzwell*, her executors, administrators and assigns, for and during all the rest, residue, and remainder of a certain term of 2,000 years, formerly raised and granted thereon, then subsisting, and undetermined, for the yearly rent of *one shilling*. There was a covenant "that he had full power to assign," and "for quiet enjoyment "during all the rest and residue of the said term therein yet to "come and unexpired." The subscribing witness to this deed said, that *William Tarzwell* lived at *Bladrop* in the parish of *Street*, at the time of the execution of the deed: That *Mary* was *not present*: But he was perfectly sober at the time. He brought the deed with him to her, and some shillings passed from her to him. It was not called a deed of gift; but a deed of assignment. He offered to give up the writings to her; but

she

she said he might keep the premises for his life; though she had a right to them immediately. It was by her consent he continued in possession. He gave directions about the estate ever since his mother's death; which was in 1765 or 1766. A year ago, *William* offered her ten pounds for the estate, which she refused; saying, at the same time, "that it was not her intention to turn him out."

1777. DENN *versus* BARNARD.

William Southey, the officer of the surrogate's court, produced the will of *William Tarzwell*, the father, dated the 25th of *August* 1755, by which he gave the premises to his wife; and after her decease, to his son *William* during the term he had therein unexpired. On the will was indorsed the act of court, dated the 1st of *June* 1756, in these words: "This was proved, "&c. on the oath of *Elizabeth Tarzwell*, sole executrix therein "named, who was then sworn, &c."—The defendant refused to enter into any title, whereupon a verdict was taken for the plaintiff, with liberty to move for a new trial, without costs, on these two grounds. 1st, That the deed of assignment, without the production of the original term of 2,000 years, ought not to have been left to the jury. 2d, That the *probate* of the will of *William Tarzwell*, though made 21 years ago, and though eleven years have elapsed since the death of the executrix, should have been produced, notwithstanding the act of court entered upon the will itself.

Mr. *Mansfield* against the rule, as to the 1st objection said, that considering the length of possession under the will, and no title whatever attempted to be shewn on the part of the defendant, there was sufficient ground, without producing the original deed, creating the term of 2,000 years, for the jury to find a fee. As to the latter objection, an authentic certificate from the Prerogative Court, and produced by the proper officer, was equivalent to the probate itself; being in fact the same thing, only under another form.

Mr. *Gould contra*, contended that the recital of one deed in another, is no evidence of the deed recited, though the deed containing the recital be well proved; because the attestation of the original deed is still wanting. *Roe* v. *Huntington*, *Vaughan* 74. 82. 10 *Co.* 92. If the recital therefore was insufficient, the possession had nothing to apply to; and clearly in point of time it would not make a fee: for the testator died in 1756; and the assignment was in 1771.

1777. Denn *versus* Barnard.

Lord Mansfield.—The single question in this case is, Whether, upon all the evidence given, the plaintiff ought to be nonsuited, not having sufficiently made out his title? The defendant has not attempted to shew any title. The argument on the part of the defendant has proceeded upon a supposition of a precise title set up. But I confess I do not see it in that light. The title is a possession of 20 years. The argument supposes the testator had just got possession at the time of making his will. But that is not warranted by the facts. It is proved that in 1755 he made his will, and gave the premises in the manner stated in the report. How long he was in possession before, does not appear. But the defendant does not attempt to shew any one else was in possession before. It rests therefore in presumption; and consequently was matter proper for the consideration of the jury. The possession afterwards was clearly *under the will*, till within two years before the title tried. What else appears to shew that the title was not a fee? It is answered, that the testator held under an old term of 2,000 years. But that will not avoid the title, if the jury are satisfied that he has been in possession 20 years. If no other title appears, a clear possession of 20 years is evidence of a fee; not that he held under the lease. The lease is one of his muniments. No man has a lease of 2,000 years *as a lease*; but as a term to attend the inheritance. Half the titles in the kingdom are so. Therefore unanswered, I think this was very good evidence to leave to the jury.

Per Cur. Rule discharged.

Friday, May 2d.

Goodtitle *ex dim.* Robert Edwards *versus* Peter Bailey.

In *ejectment*, which is a *fictitious* action to recover the possession, the lessor of the plaintiff shall not be permitted to *defeat a solemn deed under his own hand*, covenanting that the *defendant shall enjoy* the premises, and also, for *further assurance*.

Upon shewing cause why the nonsuit entered in this case should not be set aside, and a new trial granted, the facts appeared to be as follow:

It was an ejectment brought for two tenements in the county of *Dorset*, distinguished by the names of the greater and less tenement. The plaintiff claimed under the will of one *Nicholas Edwards*, dated *March* 12th 1750, by which he devised the premises in question "to his wife *F. Edwards*, for life, and "after her decease to his brother *John Edwards*, to be at his "disposal: But in case he should happen to die before the "said *F. Edwards*, then he gave the premises to his cousin

"*Robert*

" *Robert Edwards*, (the plaintiff,) and his heirs and assigns for " ever:" And he died soon after. Upon his death, *John Edwards* entered into and kept possession of the *greater* tenement during his life; and by will devised *both* the tenements to the defendant *Peter Bailey*. He was possessed of several other premises which he devised to the lessor of the plaintiff, by the same will: And died in the life-time of *Frances*, the widow, who, upon the death of *Nicholas* her husband, entered into and kept possession of the *less* tenement till she died.—Upon the death of *John*, *Peter Bailey*, the defendant, took possession of the greater tenement, which *John* during his life had occupied. Soon after, *Robert*, the lessor of the plaintiff, by deed of release, bearing date 5th *January* 1764, reciting the will of *Nicholas*, and also reciting the will of *John Edwards*, the brother of *Nicholas*; and further that *Frances* the widow had survived *John*, whereby the reversion of the premises was become vested in him *Robert* in fee; reciting also that it had been agreed that he the said *Robert* should renounce all his right, title, and interest in the said premises, to *Peter Bailey*, *the said* Nicholas Edwards *having no power to devise the same*; he did thereby *renounce*, *remise*, *release*, *and for ever quit claim* to the said *Peter Bailey*, and the heirs male of his body, all the said premises, and all his right, title, and interest therein; with a covenant for further assurance. Subsequent to this release, the widow died; and then *Robert*, the lessor of the plaintiff, brought this ejectment. Upon the release being read and proved, several objections were taken to it at the trial on the part of the plaintiff. 1. That there was no *privity* of estate between the lessor of the plaintiff and the defendant, at the time of the release. To this it was answered, that it was not a release by way of enlargement of the estate, but *pur mitter le droit*, therefore no privity was necessary: But this objection was given up. 2. That in respect of the lesser tenement, the widow being in possession, there was no estate in *Peter Bailey* at the time, upon which the release could operate. 3. That it was fraudulent upon the face of it, being without consideration; and also, for that the recital, relative to *Nicholas* having no power to devise the premises, was false; to prove which, the plaintiff in reply produced the will of *John*, the father of *Nicholas*, giving the premises to *Nicholas* in fee.—But these objections were overruled by the judge, who thought that as the lessor of the plaintiff took a considerable estate under the will of *John Edwards*,

 under

1777. under which the defendant claimed, he ought not to be allowed to impeach it; and accordingly directed a nonsuit.

GOOD-TITLE *versus* BAILEY.

Mr. *Mansfield* and Mr. *Buller* now argued in support of the nonsuit, and against the rule for a new trial. Mr. Serjeant *Heath contra*, for the rule.

For the defendant it was argued, that supposing the *release* could not operate as *such*, for want of a sufficient possession in the releasee at the time, yet it might operate as a *grant* of the *reversion*. It is a settled rule in the construction of deeds, that if sufficient appears to shew the intention of the party to convey, though it cannot take effect in the precise form in which it was intended, it shall operate in the way in which it can, rather than the intent of the parties shall be frustrated. *Sheppard*, in his *Touchstone* 82, says, "A deed made to one purpose, may enure to "another; if meant for a release, it may amount to a grant of "the reversion; or *e converso*." So in 2 *Wilf.* 75. a deed, intended for a release, was held to operate as a *covenant to stand seised*: And the cases there cited establish the doctrine. If so, nothing can be clearer than the intention of *Robert* to convey in this case; not only from the general words of the deed, but from the covenant for further assurance. But a decisive answer is, that the plaintiff is estopped by his own deed. The claim he sets up is expressly against his own deed, and the objections made to the form of it, go to defeat it. No man shall be suffered to do that. As to the objection of *fraud*, because the recital relative to *Nicholas*, is false, the circumstances manifestly shew there was some instrument, though none such has appeared, under which *John Edwards*, was entitled, which warranted him in taking possession of the greater tenement, as he did, in the life-time of the widow, and disposing of them both at his death, notwithstanding the will of *Nicholas*. With respect to there being *no consideration*, the estate which the plaintiff took under the will of *John Edwards*, was a sufficient consideration for his confirming the devise of the premises to the defendant. But if it were not, as the plaintiff is content to take such estate, he ought not to disturb the other devisees in the will. Therefore upon every ground the nonsuit was right.

Lord *Mansfield* as to the objection of fraud observed, there was no evidence of any fraud; that the recital did not appear to be the inductive cause of the release; and unless some inducement was shewn, fraud could not be presumed. If any colourable evidence of fraud had been given, the nonsuit would have been wrong;

wrong; because fraud in this case would be a matter of fact; of which the jury are to judge. So if the plaintiff could have made out a case of *mistake*, it would have been equivalent to fraud. But nothing of the kind appears; and as to the consideration, it might be fair enough. It depends upon the treaty.

1777.

GOOD-TITLE *versus* BAILEY.

For the plaintiff, as to the *other* point, it was contended, that admitting the rule laid down to be true in its fullest extent, yet nothing passed by the release in this case for want of proper operative words. There are appropriated terms to every conveyance: And where the word "*grant*" is used, being *genus generalissimum*, if the instrument cannot take effect according to its proper form, it shall operate in some other if by law it can. But here the words are "*renounce, remise, release* and *quit claim*," which are the special form of words adapted to a *release* only; therefore it cannot operate as a grant. And so is *Co. Lit.* 301. "A release cannot operate as a grant, because it is a peculiar manner of conveyance adapted to a special end." In the case from 2 *Wils.* 75. the word "*grant*" was used; and so it was in the cases there cited. But here there is no such word, nor any thing equivalent to it; consequently nothing passed by the deed. If not, the defendant's case is not aided by the covenant for further assurance; for that at most conveys only an equitable right: And as to its being an estoppel, the plaintiff is not estopped from saying any thing, but that the defendant has *no interest*.

Lord MANSFIELD.—The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: That they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention. But an objection is made in this case, which, it is said, takes it out of the general rule and the doctrine of the authorities cited: And that is, that in the release in question the word "*grant*" is not made use of. But that the intention of the parties was to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt. One thing however is decisive. This is a *fictitious* action to recover the possession. In such an action if a man has made a solemn deed covenanting that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so undertaken; no more than it shall

1777. GOOD-TITLE *versus* BAILEY.

be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed. Therefore *quâcunq. viâ datâ*, the nonsuit was right. It would be very idle to set aside the nonsuit, only to send the party into equity and make him pay the costs that way.

ASTON Justice.—This is the common wording of a release; but though in the shape of a release, if there are sufficient words, it may operate as a grant. The last ground however is decisive: It is clear from the general complexion and circumstances of this case, that there had been some dispute between the parties relative to the wills of *Nicholas Edwards*, and his brother *John*; and that this release was an agreement between them for the purpose of adjusting all matters in difference: And there is a covenant for further assurance. I think it would be extremely improper after that, to let the party take a legal objection for the purpose of defeating his own solemn agreement.

Per Cur. Rule discharged.

Saturday, May 10th.

BOND *versus* NUTT.

If a ship, insured *at* and *from* Jamaica, *warranted* to have sailed on or before a particular day, (with a return of premium in case of *convoy*) sail, on or before the day, from her port of lading, with all her cargo and clearances on board, to the usual place of rendezvous at another part of the island, for the sake of joining convoy there ready; it is a compliance with the warranty, tho' she be afterwards detained there by an *embargo, beyond* the day.—Tho' such place of rendezvous be *out* of the *direct course* of the *voyage*, it is no *deviation*.

UPON shewing cause why a new trial should not be granted, in this case, Lord *Mansfield* read his report as follows:

This was an action on a policy of insurance upon the ship *Capel* in the *West India* trade, lost or not lost, *at* and *from Jamaica* to *London*; *warranted* to have sailed *on* or *before* the 1st of *August* 1776. The policy was effected on the 20th of *August*, 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ship departed with convoy, and 8 *per cent.* if with convoy for the voyage, and arrived safe. At the trial there was no controversy about the facts; and they are shortly these: The ship was completely laden for her voyage to *England*, at *St. Anne*'s in *Jamaica*; and sailed from *St. Anne*'s bay on the 26th of *July* for *Bluefields*, in order to join the convoy there; *Bluefields* being the general place of rendezvous for convoy on the *Jamaica* station, like *Spithead* in *England*; and where a convoy then lay, which was expected to sail for *England* every day: But the greater part of the way from *St. Anne*'s to *Bluefields*, is out of the direct course of the voyage from *St. Anne*'s to *England*. That she arrived off *Bluefields* on the 28th or 29th of *July*: where she was immediately stopped by an embargo laid on all

vessels

vessels being in any part of *Jamaica*, and was detained there till the 6th of *August*, when she sailed with the convoy for *England*; but afterwards, being separated in the passage, was taken by an *American* privateer.—Upon these facts the jury found a verdict for the defendant.

Mr. *Wallace* and Mr. *Baldwin* shewed cause; and the case was spoken to, on two several days in this term: First, on *Thursday* the 24th of *April*; and again on *Tuesday*, the 6th of *May*. At the trial, the single question was, Whether the ship did, or did not, sail on or before the 1st of *August?* But on the argument *two* points were made on the part of the defendants. 1. That the departure from *St. Anne's*, was not a departure from *Jamaica* within the meaning of the policy. 2. If it were, that the going to *Bluefields* was a *deviation*. As to the 1st point it was observed, that ships in the *Jamaica* trade insure against two different risks, according to the season. 1. The risk here insured, called the *Summer* risk, which ends on the 1st of *August*. 2. The *Winter* risk, which begins on the 2d of *August*, and is so called from the hurricanes usual about that time. A *strict* departure therefore by the *precise* day specified in the policy, is of the very essence of the contract. It is a *condition precedent* which must be complied with, or the underwriters will not be liable. To determine whether it has been complied with in this case, the terms of the policy are material. Now this insurance is *not*, "*at* " and *from St. Anne's*;" but, "*at* and *from Jamaica*," which is not only the *common*, but *necessary* form of policies upon *Jamaica* ships: because, as it is the practice for them to sail from port to port to complete their lading, they are under such a policy protected in coasting to and fro', till they finally depart from the island for *England*. For the same reason they are never considered as having *sailed* on their voyage, till they have actually cleared the island. The question therefore is, was it the intention of the *Capel*, when she left *St. Anne's*, to sail *directly* for *England?* Most clearly it was not. If it were, *Bluefields* was entirely out of her course; and consequently a deviation. On the other hand, can there be a doubt but if she had been captured in going to *Bluefields*, that the underwriters upon this policy would have been liable? For *Bluefields* is as much a *part* of *Jamaica* as *St. Anne's*: And equally included under the word "*at*." Either way therefore, the verdict was right. 1. If the voyage begun at *St. Anne's*, the going to *Bluefields* was a deviation. 2. If it did not begin at *St. Anne's*, there was no departure from *Jamaica* till after the 1st of *August*. Consequently the underwriters are not liable.

1777. BOND *versus* NUTT.

Mr. *Dunning* and Mr. *Buller contra*, in support of the rule insisted, as to the 1st point, that the departure from *St. Anne*'s being a departure from the *port of discharge*, with all the cargo, ship's papers and clearances on board, was a complete departure from *Jamaica* for the voyage. Supposing the practice to be as stated, that vessels in this trade do sail from port to port to complete their lading, and consequently are not considered as having sailed till they finally depart for *England*, the inference drawn could not hold in this case. Because here, the *Capel*, when she left *St. Anne*'s, had every thing ready: her lading was complete; her crew, captain, cargo, clearances, were all on board; she had no occasion to go to any other port; and her full intention was finally to depart for the voyage, meaning only to touch at *Bluefields* for *the sake of the convoy* then ready. If so, though *Bluefields* might be a little out of the direct course, it was no deviation in law. *Spithead*, the general rendezvous for convoy in *England*, is out of the direct course of most ships bound to foreign parts: yet it never was held a deviation for any ship to go there for the purpose of joining the convoy. It is a *justifiable* reason: And there are authorities in which it has been so held. Therefore there is no ground for either objection, and the rule ought to be made absolute.

Lord MANSFIELD.—One point now started is entirely new: that supposing the voyage to have begun from *St. Anne*'s, the going to *Bluefields*, (which, it is admitted on all hands, was out of the course of the voyage) though for the *purpose of convoy only*, shall be considered as a deviation. In answer, it has been said by the counsel for the plaintiff, that there are cases in which the contrary has been held. But they are not cited. I could wish therefore that those authorities might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.

Adjornatur.

Upon this cause coming on again, nothing new was added on the first point. The second point was put thus: Whether, if the insurance had been from *St. Anne*'s to *England*, and the *Capel* had gone to *Bluefields* (out of her direct course) for the sole purpose of meeting with convoy, it would have been a deviation; or as much a prosecution of her voyage, as if she had diverted her course to avoid an enemy. Mr. *Dunning* and Mr. *Buller* for the plaintiff, contended it would not have been a deviation, and their argument

was as follows: Whenever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the ſpirit of the policy, and conſequently as much protected by it, as if expreſſed in terms. It cannot be diſputed but the act in this caſe was for the benefit of the inſurers, as well as the inſured. *Bluefields*, where the ſhip went, was the *general place of rendezvous* for convoy; and not a *port*, but an *open road*: No motive of *trade* therefore could, or in fact did carry her thither; her cargo being complete at *St. Anne*'s. It is true, as *St. Anne*'s lies on the oppoſite ſide of the iſland, and out of the direct courſe from thence to *England*, there was *in fact* a *deviation*: But ſuppoſe ſhe had ſprung a leak and put back to the neareſt port to refit; would that have been a deviation? Certainly not. To determine whether a diverſion from the direct courſe of the voyage, is ſuch a deviation as in law vacates the policy, the motives, end, and conſequences of the act muſt be attended to. A juſtifiable motive will excuſe. In the caſe of *Motteux* verſus *The London Inſurance Company*, 1 *Atk*. 545. "The ſhip *Eyles* was inſured "from *Fort St. George* to *London*. Upon her arrival at *Fort* "*St. George* from *Bengal*, ſhe proved to be ſo leaky, that by "the advice of the governor, *&c.* ſhe *returned to Bengal* to "refit. But being done from neceſſity, and not for any *purpoſe* "*of trade*, the underwriters were held liable." If a deviation is juſtifiable for the purpoſe of repairs, it is equally ſo for the ſake of convoy; more eſpecially if it be according to the uſage, and the convoy ſtationed at the cuſtomary place. This is expreſsly laid down in two caſes: *Bond* v. *Gonſales*, at *Ni. Pri. coram Holt*, C. J. 2 *Salk* 445. and in *Gordon* v. *Morley*, *at Ni. Pri. coram Lee*, C. J. 2 *Str*. 1,265. The *intention*, and *not* the *letter* of the contract, is the true rule of conſtruction; 3 *Bur*. 1,237. Therefore, though a difference may be taken between the preſent caſe and thoſe cited, that in *them* there was an expreſs *warranty* to depart with convoy, and *here*, there is *no* ſuch warranty; yet there is in this caſe that which is *tantamount*. For the *return of premium* was to be apportioned accordingly. It was clearly therefore a circumſtance in the contemplation of the parties: And it never could have taken place if the ſhip had not gone to *Bluefields*. Conſequently, what the captain did was not only within the ſpirit and meaning of the contract, but in furtherance and execution of the intention of the parties. If ſo, it can never be conſtrued to vacate the policy. The whole of this doctrine is more fully illuſtrated in the caſe of *Pelly* v. *The Royal Exchange Aſſurance*

1777. *Assurance Company* (commonly called the *Bank-faul* case) 1 *Bur.* 341, and *Tierney* v. *Etherington* there cited; and these principles are laid down: 1. "That whatever is usually done, is presumed to be "foreseen and in contemplation of the parties: And therefore "is understood to be referred to by every policy, and to make a "part of it, as much as if it was expressed." 2. "If what is done "by the master, is *ex justâ causâ*, as to refit, or to avoid enemies "or pirates, the policy shall *continue*." 1 *Bur.* 351. If it is *ex justâ causâ* to *avoid* an enemy, it is not less so to obtain that protection which will enable the ship to pursue its course in safety. And here, the act done was most for the benefit of the party complaining; the premium to be returned bearing no proportion to the diminution of the risk occasioned by the ship's sailing with convoy. But it may be urged, that being no immediate danger, there was no *necessity* here, as there is in the cases put. It is true there was no *physical necessity*; but there was *that* which the law holds *equivalent*. It was, in *prudence* and *discretion*, *necessary* and *advisable* to be done, and for the *general benefit* of the owners, insurers and all parties concerned. Therefore they prayed the rule might be made absolute.

BOND *versus* NUTT.

Mr. *Wallace* and Mr. *Baldwin contra*, for the defendant. The whole of the argument has proceeded upon assuming *that* as a condition of the policy which makes no part of it; and avoiding that which is the *sole* condition and stipulation between the parties: *viz.* the time specified for the ship's departure. It is true there was to be a return of premium *if* the ship departed with convoy, but there is no agreement or obligation that she should sail with convoy. It is no *part* of the contract, but only a possible event, for which, if it did happen, an allowance was to be made in the price of the premium. The ground of the policy is, that the ship should sail by a particular day. It is the *sole* condition, and the terms of it express and precise. The single question then is, have these terms been complied with? It is insisted they have; for that the ship sailed for the voyage on the 26th of *July*; and though the going to *Bluefields* was out of her course, yet being for the sake of convoy only, it was *ex justâ causâ*: therefore, no deviation. But, 1. How does it appear that this was *ex justâ causâ*? There was no immediate danger, no enemy in sight, no condition in the policy to seek for convoy. 2. How was it beneficial to the underwriter? His intention was to run *all risks*, provided the ship departed on a particular day; and to avoid the risk of the season and weather

after that time: That was his fole object. Will then the court take upon them to determine, that it was more his intereft to run the rifk of the fea, which *he* meant to avoid, than the rifk of capture, which he was indifferent about? If it will not, there is an end of the queftion. It is very different from the cafes cited. In *them*, there was an *exprefs warranty* to depart with convoy. No doubt, in fuch a cafe, all the *means* of attaining the end infured are neceffarily included in the policy: And *there*, the *feeking* for convoy is *part* of the contract. But here, the *time* of *departure*, is the *fole* ground. It is an exprefs condition which neither ftorm nor enemies, unlefs complied with, can excufe. As to the argument of its being beneficial to all parties, *that* would equally apply if the fhip had ftaid in the harbour of *St. Anne's* in expectation of convoy; or if the convoy had not failed from *Bluefields* for a month after the *Capel* arrived. And there is no drawing the line. Therefore the verdict is right, and the rule ought to be difcharged.

1777.

BOND *verfus* NUTT.

Lord MANSFIELD.—I am extremely glad this motion has been made; the caufe came on at *Guildhall*, by the candour of the parties, in the faireft manner. But I had no intimation of its being a caufe of confequence till after the verdict; when I was informed 100,000*l.* depended upon it. The queftion was fairly tried, and the cafe has been very well argued on both fides. I have thought much of it fince the trial. Some things are clear: And there are fome which require confideration. The policy was made on the 20th of *Auguft* 1776, upon the contingency of a fact which muft have exifted one way or the other at the time the policy was underwritten. That contingency was, that the fhip fhould have failed on or before the 1ft of *Auguft*: Confequently, it muft have taken place or not upon the 20th of that month. The port from whence the fhip was to be infured was, if I may ufe the expreffion, the whole ifland of *Jamaica*. But from which of the ports the fhip would fail neither party knew. Therefore they have ufed the words "*at* and *from Jamaica*:" By force of which, fhe certainly was protected in going from port to port, and *till* fhe failed. It follows that the word "failed" in the warranty, muft mean that fhe had failed on her *homeward bound voyage*. The queftion then is a matter of fact; and one that admits of no latitude, no equity of conftruction, or excufe. Had fhe or had fhe not failed on or before that day? That is the queftion. No matter what caufe prevented her; if the fact is, that fhe had not failed, though fhe ftaid behind for

1777. the best reasons, the policy was void: the contingency had not happened; and the party interested had a right to say, there was no contract between them. Therefore, what was said by Mr. *Wallace* in the argument, is very true: If she had been prevented by any accident from sailing till the 2d of *August*, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to sail, but there would have been an end of the policy. It is very different from the cases where a voyage has been begun: There the *usage* of the voyage may justify going a little out of the direct course. This also is clear; if the ship had broken ground and been fairly under sail upon her voyage for *England* on the 1st of *August*, though she had gone ever so little a way, and had afterwards put back from the stress of weather, or apprehension from an enemy in sight, or had then been put under an embargo, and been detained till *September*, it would still have been a *beginning* to sail; and the stoppage would have come too late. Because the warranty was upon a fact *antecedent*. Such a case * happened before me a day or two after the present action was tried. It was an insurance upon a ship from *Grenada* to *London* warranted to sail on or before the 1st of *August*. She had barely begun to sail on the day when she was stopped by an embargo, and detained beyond the time. I thought the voyage was begun: The jury were of that opinion, and there has been no motion for a new trial.—I am giving no opinion, only breaking the case. Here the whole question turns upon this: Did the voyage from *Jamaica* homeward, begin from *St. Anne*'s or from *Bluefields*. Perhaps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties: But still it does not vary the fact of sailing. Here it was very reasonable: But the question whether the voyage began from *St. Anne*'s or *Bluefields* still remains.—Another material circumstance arises from the words "at and from *Jamaica*." At the trial I reasoned thus: "By the terms of the policy she was protected during "her stay at *Jamaica*: By force of them, she had a right to "go to any port, or all round the island; and she went to "*Bluefields* for reasons best known to herself. Therefore the "voyage began from *Bluefields*." Had the insurance been "*at and from the port of St. Anne's*," it did strike me that going round the island to *Bluefields* would have been a deviation. But this

BOND *versus* NUTT.

* The name of it was *Thelusson* versus *Fergusson*.

is a queſtion of ſo much value and conſequence, that the court wiſhes to conſider the caſe thoroughly, before they give a final deciſion upon it. 1777. Bond *verſus* Nutt.

ASTON Juſtice.—I ſhall be very glad to conſider this caſe. As at preſent adviſed, it ſeems to me to depend upon a mere matter of fact: And therefore to be very different from the caſes of deviations that have been put. In them, the change of voyage being from neceſſity is excuſed in point of law: But here, the whole queſtion is, did the *Capel* ſail from *Jamaica* on or before the 1ſt of *Auguſt* according to the true ſenſe and meaning of the policy? If ſhe had fairly commenced her voyage on her departure from *St. Anne's*, and the going to *Bluefields* is to be taken as the *uſage of the voyage*, I ſhould think the underwriters would be liable. So, if ſhe had broken ground for the voyage, and had gone but a league and been blown back again. But, if ſhe found no convoy at *Bluefields*, ſhe could not have ſtaid there to wait for convoy: That would have vacated the policy. So, if her going to *Bluefields* is to be conſidered only as a continuation of her ſtay at *Jamaica*, the policy is at an end. She certainly was ready at *St. Anne's* to depart for the voyage: And ſhe went to *Bluefields*, not to take in part of her cargo (for then it clearly would not have been a commencement of the voyage), but from a juſt motive. Whether that was or was not a commencement of the voyage, is clearly a matter of fact; and, in this caſe, a very material one; therefore ought to be very fully conſidered.

WILLES Juſtice.—This is clearly a matter of fact. I think if the ſhip upon her arrival at *Bluefields* had found no convoy, ſhe could not have ſtaid there; but muſt have ſailed immediately; or if ſhe had met with convoy and had ſtaid an unreaſonable time for other ſhips, the inſurers would not have been liable.

Cur. adviſare vult.

Afterwards on this day Lord *Mansfield* delivered the opinion of the court as follows: We are all ſatisfied that the truth of the caſe is, that the voyage from *Jamaica* to *England* began from *St. Anne's*. That, when the ſhip ſailed from *St. Anne's* ſhe had no view or object whatſoever, but to make the beſt of her way to *England*; and ſhe touched at *Bluefields* only, as being the ſafeſt and beſt courſe (under the then circumſtances) of her navigation to *England*. That the value of this queſtion admitted on both ſides ſhews, that every other ſhip under the ſame cir-

1777. BOND *versus* NUTT.

cumstances looked upon the touching at *Bluefields*, where the convoy then lay ready, to be the safest course of navigation from *Jamaica* to *England*; and that it would have been unwise and imprudent for any ship not to have touched there. The *great distinction* is this: That she sailed from *St. Anne's* for *England by the way of Bluefields*; and that it was not a voyage from *St. Anne's* to *Bluefields* with any object or view distinct from the voyage to *England*. If she had gone first to *Bluefields* for any purpose independent of her voyage to *England*, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, *that* would have given it the condition of *one* voyage from *St. Anne's* to *Bluefields*, and *another* from *Bluefields* to *England*. But here, under all the circumstances, we think she had no other object than to come to *England* directly by the safest course. Therefore the rule for a new trial must be made absolute.

THE END OF EASTER TERM.

TRINITY TERM

17 George III. *B. R.* 1777.

Rex *verſus* Clark *et al.*

Saturday, May 31ſt.

Upon an information and verdict againſt *ſeveral* perſons, for obſtructing a Cuſtom-houſe Officer contrary to ſtat. 8 *Geo.* 1. *c.* 18. *ſ.* 25. *each* defendant is *ſeparately* liable to the penalty impoſed by the act.—Where an offence created, or made penal, by ſtatute, is in its nature ſingle, one ſingle penalty only can be recovered, tho' *ſeveral* join in committing it.—But if the offence is in its *nature, ſeveral, each* offender is *ſeparately* liable to the penalty.

THIS was an information filed by the Attorney General againſt the three defendants *Clark*, *Lilly*, and *Bateman*, upon the ſtat. 8 *Geo.* 1. *c.* 18. *ſect.* 25. for *aſſaulting* and *reſiſting* certain cuſtom-houſe officers in the execution of their duty, and *reſcuing* out of their cuſtody ſixty half anchors of brandy and ſixty half anchors of geneva, which they had ſeized: By reaſon whereof, and by force of the ſaid ſtatute, the information ſtated, "that "the ſaid defendants had *ſeverally* forfeited the ſum of 40 *l.* "a piece." There was a ſecond count for the *aſſault only*, without the reſcue, which concluded in the ſame manner, "that "the defendants had ſeverally forfeited the ſum of 40 *l.*"

At the trial before Lord *Mansfield*, at the ſittings after *Hilary* term 1777* at *Weſtminſter*, upon "not guilty" pleaded, the jury found the defendants *ſeverally* guilty.

Mr. *Buller* laſt term† obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted, upon this objection, "that the "verdict againſt the defendants was for *three* ſeveral ſums of "40 *l.* each; whereas by the act of parliament the offence was "*entire*, and only *one* penalty of 40 *l.* given for one and the "*ſame* offence." And inſtanced the caſes of convictions upon the game-acts, where, though ſeveral offenders are concerned, only *one* penalty can be recovered againſt them all. *Hardman qui tam* v. *Whitaker. Mich.* 1748. 22 *Geo.* 2. *B. R.* MSS. So *one* penalty only for killing ſeveral hares on the ſame day. *Marriot* v. *Shaw.* MSS‡.

* 13th *Feb.* † 17th *April.* ‡ A caſe of this name is reported in *Comyns*, 274.

Mr.

1777. Rex *versus* Clark.

Mr. *Wallace* now ſhewed cauſe, and objected, 1. That the motion was *premature*: becauſe if either of the defendants were liable, the Attorney General might ſign judgment againſt him only, and releaſe the reſt. The defendants therefore ſhould have waited till judgment had been entered up againſt all; and then have availed themſelves of the objection upon error, if warranted in point of law. But 2dly, ſuppoſing the application regular at this time, there is no ground for the objection. For the penalty is not in the nature of a ſatisfaction to the party grieved, but a puniſhment on the offender; and *crimes* are *ſeveral*. So it is expreſsly laid down in *Regina* verſus *King et al.* 1 *Salk.* 182. This was an offence at common law, for which each party might have been indicted and *ſeverally* puniſhed by fine and impriſonment; and the ſtatute was made to *add* an *accumulative* puniſhment: whereas, if the conſtruction contended for by the defendants were to prevail, the greater the number of offenders, the leſs would be the puniſhment.

Mr. *Buller contra*, in ſupport of the rule. 1. As to the application being premature, if the error aroſe upon the verdict alone, it might be ſo, becauſe the Attorney General might cure it by a *noli proſequi*. But the ground of the objection is, that the *information* itſelf is inſufficient upon the *face* of it, for it is there laid as a *ſeveral* offence. Therefore, the parties at their election may take advantage of it, either in arreſt of judgment, or by writ of error. 2. With reſpect to the principal queſtion, whether ſeveral penalties can be recovered where ſeveral perſons are concerned in one and the ſame offence, it is clear by the words of the ſtatute that only *one* penalty can be recovered. For it is not ſaid "that *every* perſon offending ſhall for *every* ſuch offence "forfeit, &c;" but, "if any perſon or perſons ſhall, &c. the "*party* or *parties* ſhall for *every* ſuch offence, forfeit and loſe "40 *l.*" The word "*perſons*" and "*parties*" manifeſtly ſhew the legiſlature meant to provide againſt a *joint* offence by *ſeveral* perſons; but not to multiply the penalty on that account: The penalty refers to the *offence*, *not* to the *perſons*; and ſo it is laid down in *Cro. Eliz.* 480. *Partridge* v. *Nailor*: reported likewiſe in *Moore* 453. and *Noy.* 62. That was an action on the ſtat. 1 & 2 *Phil.* & *Mar.* c. 12. brought againſt three defendants for impounding diſtreſſes in ſeveral places. Upon not guilty, the jury found a verdict againſt all three; and judgment was entered up for 5 *l.* and coſts againſt each defendant ſeverally. But upon error it was held to be clearly bad, there being but *one* offence; notwithſtanding the words of the ſtatute there are,

that

that "*every person* offending shall for *every such offence* for- 1777.
"feit, &c."

So in convictions upon the stat. 5 *Ann.* c. 14. though several are concerned in the same offence, one penalty only can be recovered. *Hardman qui tam* v. *Whitaker et al.* *Mich.* 22 *Geo.* 2. *B. R.* 1748. MSS.—Therefore he prayed the rule might be made absolute.

REX *versus* CLARK.

Lord MANSFIELD.—There is no cause of greater ambiguity, than arguing from cases without distinguishing accurately the grounds upon which they were determined. The true reason of the cases which have been cited in support of the motion, and the distinction between those cases and the present, is this: Where the *Offence* is in its *nature single*, and cannot be severed, there the *penalty* shall be only *single*; because, though several persons may join in committing it, it still constitutes but *one* offence. But where the offence is in its nature *several*, and where *every* person concerned may be *separately* guilty of it, there, each offender is separately liable to the penalty; because the crime of each is distinct from the offence of the others, and each is punishable for his own crime. For instance; the offence created by the stat. 1 & 2 *Phil.* & *Mar.* c. 12. is "the impounding a distress in a wrong place." One, two, three or four, may impound it wrongfully; it still is but *one* act of impounding, it cannot be severed It is but *one* offence; and therefore shall be satisfied by *one* forfeiture. So, under the stat. 5 *Ann.* c. 14. for the preservation of the game; killing a hare is but *one* offence in its nature; whether one, or twenty kill it, it cannot be killed more than once. If partridges are netted by night; two, three, or more may draw the net; but still it constitutes but *one* offence. But *this statute* relates to an *offence* in its *nature several*; a several offence at common law: and the statute adds a further sanction against that, which each man must commit severally. One may resist, another molest, another run away with the goods: One may break the officer's arm, another put out his eye. All these are distinct acts; and every one's offence entire and complete in its nature. Therefore each person is liable to a penalty for his own separate offence—With respect to the application being premature, Mr. *Buller* has sufficiently answered that objection. The information itself lays it as a several offence; therefore a motion in arrest of judgment is proper.

ASTON Justice.—Suppose a person, not present at the time of the offence being committed, were to have advised or procured it to be done: I am of opinion, under the words of this act, he would

1777. be liable to the penalty. The distinction is, that the offence here, is in its nature *several*. I remember the case of *Hardman qui tam* versus *Whitaker et al.* There, the offence was considered as being in its nature only *one* offence. But in this case, the offences of the several defendants are distinct and separate.

Rex *versus* Clark.

Per Cur. Rule discharged.

Saturday, June 8th.

Rex *versus* Francis Hill.

Where it has been the *usage* in a parish to rate persons to the poor for their *stock in trade within the parish*, such persons are liable under the stat. 43 *El. c.* 2. to be rated to the poor in respect thereof.

MR. *Mansfield*, Mr. *Morris*, and Mr. *Batt* shewed cause against a rule for quashing an order of sessions confirming a poor's rate. The order of sessions was as follows: *Wilts*—Upon hearing the appeal of *Francis Hill* against a rate for the relief of the poor of the parish of *Bradford*, in this county, complaining that he was assessed and rated, for, and in respect of, his stock in trade in the said parish, whereas he was advised that he was not by law liable to be so assessed and rated, in respect of such stock in trade; It appeared in evidence, that the said appellant was a clothier, and that he was, and for some years past had been, an *inhabitant* in the said parish of *Bradford*, where many other tradesmen, particularly clothiers and manufacturers of woollen goods, likewise lived: And that he there carried on the business of a clothier; and, at the time of making the rate in question, was actually possessed of a considerable stock in such his trade, within the said parish of *Bradford*. And that the churchwardens and overseers of the poor of the said parish, at *Easter* 1775, made the rate in question; which was properly allowed by two justices of the peace, for the relief of the poor of the said parish: and therein charged the appellant a *penny* as his share or contribution towards the relief of the poor of the said parish for the said year 1775, in *respect of* his *stock* in the said clothing *trade*, which he then had in the said parish; and which said charge of a penny a rate, was proved to be more than his just proportion or share towards the said rate, *if, in respect of* such his said *stock in trade*, he was legally bound to contribute any thing towards the relief of the said poor of the said parish. Whereupon, and upon due consideration of the premises, this court doth order and adjudge, that the said rate be, and the same is, hereby confirmed.

Mr. *Batt* argued as follows: This question takes a different turn from any other that has been discussed here; For it is stated

not

not as a case of landholders aggrieved by the omission of a set of men, rateable, as they conceive, in respect of their *personal* property; but as a complaint by a tradesman upon his being rated to the poor for his *visible stock in trade*, within the parish: And this is the shape in which, Lord *Mansfield* said in the *Witney* case, such a question ought to come on: Not, as a *general* question, whether stock in trade be rateable or not; but, as the particular one made by an individual, whether he is bound to contribute to the poor's rates in respect of the stock in trade which he possesses within the parish of *Bradford*. The whole question, therefore, depends upon the construction of the stat. 43 *Eliz. c.* 2. And the best way to attain the true construction of that act, is to examine the law antecedent to the making of it.

1777. REX *versus* HILL.

By the *common law*, as appears by the *Mirror*, *p.* 14. "the poor "were to be maintained by the parsons, rectors of the church, "and by the parishioners;" but by what mode is not there specified. There is however a recognition of this provision, in the case of *Rex* v. *Loxdale*, *Hil.* 30 *Geo.* 2. *B. R.* * It is a matter of obscurity how the poor were maintained before the statutes which now provide a maintenance for them. The religious houses most probably contributed much towards it: And this conjecture seems the better founded, from the time when the first provision was made for them by statute; which was in the 27th year of *Hen.* 8th, just about the time of the dissolution of the monasteries. I shall select the most remarkable expressions in that and the several subsequent statutes, in order the better to ascertain the true intent and meaning of them. By the 27th *Hen.* 8. *c.* 25. "the several *hundreds*, *towns corporate*, *parishes*, and "*hamlets* were to maintain the poor." By the 1st *Ed.* 6. *c.* 3. "cottages are to be provided for the poor at the costs of *cities*, "*towns*, and *boroughs*, at the devotion of good people." By the stat. 5 & 6 *Ed.* 6. *c.* 2. "the minister and churchwardens are "to ask of *every man and woman* what they will give; and if "any person, being *able*, refuse to give, they are to be ex"horted, &c." By the 14th *Eliz. c.* 5. "all and every the in"habitants are to be taxed to the relief the poor, &c." By 18 *Eliz. c.* 3, "a stock of wool is to be provided for employ "of the poor of *all* the *inhabitants* to be taxed and gathered." These expressions give no room to doubt but that the true meaning of these statutes is, that *all inhabitants* of a parish, able either in respect of their real or *personal property* to contribute

* 1 *Burr.* 445.

1777.

Rex *versus* Hill.

to the maintenance of the poor, are intended to be comprized under the description of "persons liable to that burthen." The first remarkable alteration in the terms of those acts is to be found in the 39th *Eliz. c.* 3. *sect.* 4. where the words "*occupiers* of *land* within the parish" are used. The reason of which introduction was probably on account of certain persons who claimed to be exempted out of the former statutes, as not residing in the parish. The word "*inhabitant*" however was still retained. If it should be argued that the word "inhabitant" was retained for any other purpose than that of including persons who were rateable for their *personal property*, it is incumbent on the other side to shew it.

Taking this therefore for granted, that the meaning of the word "*occupier*" was to include persons who were *owners of land residing out* of the *parish*, and that the word "*inhabitant*" continued as it did; the next consideration is the stat. 43 *El. c.* 2. *s.* 1.

It is the opinion of Dr. *Burn*, that the stat. 43 *Eliz. c.* 2. did no more than re-enact the 39 *Eliz. c.* 3. The object of taxation, and the subject matter are the same in both; but rather more minutely expressed in the latter; yet neither the preamble, nor any other part of the latter, shews an intention to make a change. The same persons therefore were liable to be rated: And if that statute were now for the first time to receive a construction, there could be very little doubt of the exposition of it. It would be a very violent exposition of it to say, that those persons alone who are possessed of real property were liable to be taxed to the poor. The clergy, the merchant, the tradesman, all benefit by the labour of the poor, as much as the owner and the occupier of land. It is but just then, that they should all contribute towards the maintenance of the poor. *Qui sentit commodum sentire debet et onus!*—I shall next consider how far this construction of the statute has received a sanction and been recognized by other statutes. By stat. 22 *Car.* 2. *c.* 12. *s.* 10. for the repairing of highways and bridges, it is enacted, that "one or more assessment or assessments upon all "and every the *inhabitants*, owners and occupiers of lands, "houses, tenements, and hereditaments, or *any personal estate* "*usually rateable to the poor* within any such parish, shall be "levied, &c."

By stat. 2 *Gul. & Mar. c.* 8. for paving and cleansing the streets in the cities of *London* and *Westminster*, it is enacted, that for the "better mending of the highways, one or more assessment or

"assess-

" assessments upon all and every the *inhabitants*, owners and oc- 1777.
" cupiers of lands, houses, tenements, and hereditaments, *or any personal estate usually rateable to the poor* within any of the said " parishes, shall be levied, &c." By stat. 3 & 4 *Gul.* & *Mar.* c. 12. for the repairing and amending highways, it is enacted by *sect.* 18. that " No assessment for the purposes therein de- " clared, shall exceed the rate of six pence in the pound of the " yearly value of lands, houses, tenements, and hereditaments, " &c. nor of sixpence for twenty pounds of *personal estate* " *usually rateable to the poor* within such parish, hamlet, " &c." By stat. 1 *Geo.* 1. c. 52. *sect.* 6. for making more effectual the laws for the repair of highways, it is enacted by reference to stat. 3 & 4 *Wil.* & *Mor.* c. 12. " that the " justices of quarter-sessions, &c. may, if they see fitting. " cause assessments to be made, and money to be raised not " exceeding the proportions limited by the said act."—It is not particularly said what those proportions are; but I consider this statute, as a direct recognition of the 3 & 4 *W.* & *M.* c. 12. as much as if it had been said so in express words. These several statutes therefore taken together prove, that the legislature has at different times thought *some species of personal property* rateable to the poor: For they in terms speak of "*such personal* " *property* as is *usually rateable to the poor.*" But be that as it may, it is enough for the present argument that some sorts of personal property are rateable by the stat. 43 *Eliz.* c. 2. and if it be reasonable that *some* should, nothing can be more reasonable than that *visible property*, such as *stock in trade*, should be so too. Besides this legislative exposition of that statute, there are a variety of authorities which speak the same language.

REX *versus* HILL.

The first in point of time is the answer of the twelve judges to the 18th *quære* in *Dalt.* justice, c. 73. *p.* 231. *Ed.* 1727. This answer says, " that the *land* within each parish is to be " rated, in the first place, to the relief of the poor; but that " there may be an addition for the *personal visible ability* of the " parishioners within that parish."

In Sir *Anthony Earby*'s case, 2 *Bulf.* 354. *A. D.* 1633. upon complaint to the judges of assize by the inhabitants of the town of *Boston* upon an undue assessment made by the said town and overseers of the poor, it was held, and so delivered for law by *Hutton* and *Croke* justices of assize, " that such assessments ought " to be made according to the *visible estate* of the inhabitants " there *both real and personal.*" And also, that this has been so resolved by all the judges of *England* upon a reference

1777. Rex *versus* Hill.

made to them, and upon conference together, when they resolved, that assessments for the relief of the poor ought "to "be made in *such manner as before*, according to their *visible* "*estate, real and personal*, which they had in the town where "they lived." Now, though the note in *Dalton* be *anonymous*, and may therefore seem to want authority; yet it is improbable, that *Bulstrode* should be mistaken when he quotes the answer of the judges. His reports were published in 1657, by himself. Sir *Robert Heath*, mentioned by *Dalton* to be chief justice in 1633, when the answer of the judges was delivered, was made so in 1631; *Croke* was made a judge in 1628; and *Hutton* in 1617. Taking then the authorities both of *Dalton* and *Bulstrode* as not to be disputed, the next case in point of time is that of *Rex* versus *Clerkenwell*, which was as follows: "An order made to confirm a poor's rate, which rate was made "according to the land-tax, was quashed. Objected, that this "taxation was not equal, because the personal estate in the pub- "lic funds is not chargeable to the land-tax, but it is to the "poor: And by the whole court, this rate for that reason was "set aside." *Hil.* 2 *Geo.* 1. *B. R. Foley* 23.

The next is the case of *Rex* v. *St. Leonard, Shoreditch, Cas. temp. Holt*, 508. In which the court could not have confirmed the first order without recognizing the rateability of personal property. Nor the *second*, without holding that the sessions did right in deciding that more equality was proper in taxing the different sorts of estate than had been observed.

The next is the case of *Regina* versus *Barkin*, 2 *Lord Raym.* 1,280. where all the judges agreed, that a tradesman (*artifex*) is liable to be rated for his stock in trade. There are various authorities too in *Vin. Abr. vol.* 16. where he refers to *Shaw* and to MSS. cases. I would refer the court likewise to the opinion of Lord *Hale* in his scheme of the poor laws; to Dr. *Burn*'s History of the Poor Laws; and to the cases of *Rex* versus *Guardians of the poor of Canterbury*, *Rex* versus *The inhabitants of Whitney*, *Rex* versus *The inhabitants of Ringwood* *, *Rex* versus *The inhabitants of Andover* †.

More attention ought to be paid to a case like this; where a man comes who is rated for *visible local property within the parish*. For it is stated as a complaint by an individual of a rate imposed upon him, who at the same time acknowledges, that

* *Supra*, 326. † *Supra*, 550.

if

if personal property is rateable, the *proportion* charged upon him is a *just* one. And to prove this, I shall cite what the court said in the case of *Rex* versus *The inhabitants of Andover.* Lord *Mansfield* said "It is doubtful whether, to the extent in which "it has been argued, personal property is rateable or not; if "it were to be so without regard to any thing local or visible, "the watch in a man's pocket, soldiers' pay, lawyers' fees, would "be liable, &c. A less question is, whether a *man in trade* shall "not be rateable for his *stock.* To be sure *some personal* proper-"ty may be rateable; but then it must be *local visible property* "*within the parish.*"

As to the inconveniences that it may be supposed would attend the rating of it; stock in trade in some respects is rated to the land-tax, as appears from the case of *Rex* versus *Whitney.* But in answer to that, I shall submit, that if the law authorizes the tax, a difficulty in the mode of levying it can be no objection; besides the tax is now actually raised in many places of this kingdom, in *Lynne, Norwich, Frome, Trowbridge, Warminster, Bewdley, Blandford,* in many parishes of *London,* and in particular that of *Whitechapel.* And how was it formerly in the case of the subsidies to which the land-tax succeeded? *Personal* as well as real estate contributed towards them; and therefore there must have been a mode of ascertaining each man's abilities to contribute, and the proportion was fixed, as appears in *Gilb. Exch. c.* 14.

From the examination therefore of every writer upon the subject, from the stat. 43 *Eliz.* and the several statutes recognizing the construction I have given it, from the authorities in the books, and from the circumstances of inequality upon any other ground of construction, I submit to the court that this rate is a good one, and ought to be confirmed.

Mr. *Widmore* for the defendant was stopped in his argument by a question from Lord *Mansfield,* what the usage heretofore had been in this place with respect to rating stock in trade? Mr. *Morris* answered that the usage was waved, and that he and Mr. *Widmore* had agreed at the sessions to bring the general question before the court.

Lord *Mansfield* said they had no right to do so: and thought it ought to be sent back to the sessions to state the usage. That the highway acts referred to *personal* estate *usually* rateable to the poor.

1777.

REX *versus* HILL.

Mr. Justice *Aston* said, the case of the *King* v. *Whitney* was incorrectly reported, in *Bott's* Poor Law, in respect of what Mr. Justice *Yates* is there mentioned to have said.—That he thought in this case the usage ought to have been stated. And accordingly the court ordered the case to be referred back to the sessions for that purpose.

Afterwards, in *Hilary* Term * 1778, the case being returned, and the quarter sessions stating, "That it had been the usage "heretofore in the parish of *Bradford*, to rate persons there for "their stock in trade," the court ordered the rule for quashing the rate to be discharged, and confirmed the original order of sessions.

* *Saturday, Jan.* 31.

REX *versus* MILLER.

Same day.

If one rent a quantity of land together with a *mineral spring* thereout arising, at a *gross* yearly rent, he is rateable to the poor in respect of the *whole* of such rent: Tho' *in fact* the annual value of the land, *independent* of the spring, is only in proportion of 2 to 8 of the reserved rent.

MR. *Bearcroft* shewed cause against a rule for quashing an order of sessions confirming a poor's rate. The order of sessions stated the following case: "Upon the appeal of *William* "*Miller* of *Cheltenham*, in the county of *Gloucester*, Esq. against "a rate or assessment made for the relief of the poor of the said "parish of *Cheltenham*, for that he is unequally rated therein in "respect of the *lands* and *buildings* by him rented of Mrs. *Skil*-"*licome*, with all other land, buildings, and houses in the said "parish: This court, having fully heard as well the said *Wil*-"*liam Miller*, as the said churchwardens and overseers of the "poor of the said parish of *Cheltenham*, touching the said ap-"peal, it is ordered by this court, that the said rate or assessment "be, and is hereby confirmed: The case appearing to be, that "Mrs. *Elizabeth Skillicome* of the parish of *Cheltenham*, in the "county of *Gloucester*, by lease dated the 20th of *May*, 1776, had "demised to the appellant the said *William Miller* of the parish "of *Cheltenham* aforesaid, *certain lands* containing about four "acres, with buildings thereon, *and a certain well* of mineral "water thereout arising, called the *Cheltenham Spa*, for the "term of 21 years, determinable at the option of the lessee at "*seven*, fourteen, or one and twenty years, at the *yearly rent* of "*one hundred pounds*. And it further appearing to be, that the "*lands* and *buildings* thereon, independent of the well, are of "the annual value of about *twenty* pounds; that the *rent* paid "by the said *William Miller* for the *mineral water* of the said "well is *eighty pounds*; that the profits of this mineral water to "the lessee the said *William Miller*, arise from the sale thereof

"and

" and the company resorting thereto, which is very various and " *uncertain*; and that the said *William Miller* stands rated for " the premises aforesaid in the said rate at the sum of five " pounds, which is *equal* to a rate of one hundred pounds *per* " *annum* for lands in the said parish." 1777. Rex *versus* Miller.

Mr. *Bearcroft* in support of the order of sessions and against the rule, observed, that the rate in this case was an *entire* rate upon the *gross rent*, paid by the defendant for the premises in question; and assessed upon him in respect of such rent: not so much for the profits of the water, and so much for the land; but an *entire* rate upon the *whole* as *land*: Therefore not distinguishable from the case of any other occupier of land rated in respect of his rent. He supposed however a question would be made on the other side, whether mineral water was rateable to the poor: If it were, he should have an opportunity of speaking to it in reply.

Mr. *Dunning* and Mr. *Clifford contra*, in support of the rule contended, that the words of the stat. 43 *Eliz. c.* 2. did not include this species of property: That the rate was not, as had been said, a rate upon the *whole*, as *land*; though the *rate itself* did *not distinguish* between the annual rent of the land and the profits of the spring: But the sessions *had* distinguished between them, and stated the respective amount of each: And certainly, the only question meant to be submitted to the court was, " Whether the profits of the *spring*, independent of the *soil*, " were *eo nomine*, a substantive matter of taxation?" And they insisted it was not. That the usage with respect to other mineral springs in different parts of the kingdom, at *Matlock*, *Buxton*, *Scarborough*, *&c.* was the other way. None of them were ever rated; and for this reason: Because they are in themselves fluctuating and uncertain. They may totally cease: And at best the profits arising from them depend upon the fashion of the day. Therefore, they are not a subject of taxation within the meaning or the words of the stat. 43 *Eliz. c.* 2. They cited *Rex* versus *Vandewall*, 2 *Burr.* 994. *The Governor and Company of smelting lead* versus *Richardson*, 2 *Bur.* 1,341. and prayed the rule might be made absolute.

Lord MANSFIELD.—Nothing can be plainer than the present case. This is not a rate upon the profits of the well, but upon *four acres of land*, let to the defendant at 100*l.* a year; and the value arises, partly from the *buildings*, and partly from the spring that produces the mineral water. Therefore the profits of the spring

1777.

REX *versus* MILLER.

spring are *part* of the *produce* of the *land*. In *Worcestershire* and *Cheshire*, where there are *salt* springs, the rent of the land is increased considerably on that account. So here, the consideration of the *well*, increases the rent. It is *part* of the *produce* of the *land*; and therefore, as such, I am clearly of opinion it ought to be rated.

ASTON Justice.—I am of the same opinion. The rate, in this case, is upon the *whole estate*, let at 100 *l.* a year. It is true, the justices in the case stated have divided the rent; and specially distinguished between the annual value of the land and the profits of the spring. But the lessor and lessee have made no such distinction in the lease; and the rate, is upon the whole rent in gross. Therefore the order of sessions is right.

Per Cur. Rule discharged.

Same day.

DOE *ex dim.* FOSTER *versus* WILLIAMS.

A tenant in possession is not a good witness to support his landlord's title: because it is to uphold his *own* possession.

THIS came before the court upon a rule to shew cause, why a new trial should not be granted.—Mr. *Dunning* argued in support of the rule, and Mr. *Wallace* against it. The argument on both sides was very short: And as the case and objections were fully stated by Lord *Mansfield* in delivering his opinion, to avoid repetition I have only subjoined the opinion of the court.

Lord MANSFIELD.—This was an ejectment; and an application has been made for a new trial: Whether that application is well grounded or not, must depend upon what appeared at the trial.—The plaintiff claimed as nephew and heir at law to a Mr. *Baines* the person last seised. The younger sister of the plaintiff, who was produced as a witness, proved the pedigree of her two brothers: That they both went beyond sea. That the plaintiff went to the *East Indies*, but was not reported to be dead, as the other brother was; and that he lately returned to *England*. Upon the cross examination she was questioned whether the plaintiff was not of the *half-blood* only; to which she answered she never had heard of any such thing.—The defendant, who was landlord of the premises, and who was set up to defend instead of the tenant (Mrs. *Pearce*), claimed under a Mrs. *Galton*: And in support of his title a fine was put in, levied by Mrs. *Galton* in the year 1772. At the trial, *Mr. Wallace* on the part of the plaintiff, objected, that the fine alone was not sufficient, unless accompanied with some evidence to shew that Mrs. *Galton*

was in possession at the time of the fine levied, or had received 1777.
rent. It was admitted that no entry had been made. In order
to prove possession, Mrs. *Pearce*, the tenant in possession, upon Doe *versus*
whom the ejectment had been served, was called and offered as Wil-
a witness. She was objected to, and at the trial I was of opinion, liams.
and upon consideration am strongly of opinion now, that she was not a competent witness. A tenant can never be called as a witness to support her own possession. Then it was objected by the counsel for the defendant, that, to entitle the plaintiff to bring an ejectment, he ought to have given Mrs. *Pearce* (the tenant) notice to quit. The answer given to that was, that the possession was *adverse*; therefore no notice was necessary; and I am clearly of opinion there was no occasion for a notice in this case: For the possession of the tenant was connected with that of the landlord, which was adverse.—Then Mr. *Way*, the attorney, was examined, to try to prove Mrs. *Galton* in possession by an acknowledgment of payment of rent to her by Mrs. *Pearce*. What he said was, "That before the death of Mrs. *Galton*, he "remembered a conversation between her and Mrs. *Pearce*, in "which, the one admitted she had paid the other rent as her "landlord, and the other, that she had received rent from her as "tenant." But he would not be positive to the time so as to swear it was *before* the *fine* levied. Mr. *Wallace* strongly addressed the jury in reply, and began by stating that the defendant had no colour of right; and that if he would produce any will or title, he would give up the cause. I stated to the jury that Mrs. *Galton*, who it seems was *Baines*'s mistress, had no title. That it did not appear the defendant had any title, but *possession*. But if Mrs. *Galton* was in possession at the time of levying the fine, then the plaintiff was guilty of a slip; however not such a one as would be a bar to him: For as he was beyond sea at the time of the fine levied, he would not be barred, but might bring another ejectment. That the evidence respecting the conversation between Mrs. *Galton* and Mrs. *Pearce* the tenant, was not precise and positive, whether it was had *before* or *after* the fine levied. But that was matter for their consideration. The jury found a verdict for the plaintiff. If I had directed the jury to find for the plaintiff, and they had found for the defendant, I would never have concurred in granting a new trial. A new trial ought not to be granted, merely for the sake of turning the party round; but where substantial justice cannot otherwise be obtained. And in the case of *Smith ex dim.*

Dormer

1777. *Dormer* v. *Fortescue*,* the court under such circumstances refused to grant a new trial.

Doe *versus* Williams.

ASTON, Justice.—I am of the same opinion. As to the question whether the evidence of Mrs. *Pearce* the tenant in possession was admissible in support of the defendant's title under whom she held, in *Bourne* v. *Turner*, 1 *Str*. 632. upon a motion to admit the landlord a defendant, upon an affidavit that the tenant in possession was a material witness for him, the court refused it, saying, he was liable to the mesne profits, and therefore if the motion were granted it would not make the tenant a witness. I have always understood that a tenant in possession cannot be a witness to support his own possession. Therefore I entirely agree that the testimony of Mrs. *Pearce* in this case was properly rejected. As to the other point, the evidence given by Mr. *Way* was very proper to be left to the jury; and in a favourable case might have had its effect. Here it was left to the consideration of the jury, and they have notwithstanding found for the plaintiff. Therefore the rule must be discharged.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst* were of the same opinion.

Per Cur. Rule discharged.

* 2 *Str*. 1,106.

Tuesday, June 10th.

BACH *versus* LONGMAN *et al.*

A musical composition is a writing within the stat. 8 *Ann*. c. 19. for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.

THIS was a case out of *Chancery* for the opinion of this court, stating, that the plaintiff about twelve years ago composed and wrote a certain musical composition for the harpsichord, called a *Sonata*; and that being desirous of publishing the said work or composition, together with other musical works, compositions and writings, he did apply for and obtain his Majesty's licence, dated the 15th day of *December*, 1763, whereby his Majesty did grant unto the plaintiff, his executors, administrators and assigns, his royal licence for the sole printing and publishing the said works mentioned in the said licence, for fourteen years from the date of the same, as appears by the said licence; and that about four years ago the plaintiff composed and wrote another musical composition for the harpsichord, called a *Sonata*; together with an accompaniment for the *Viol di Gamba*; and that the defendants, being music sellers and copartners, had lately obtained copies of the two several *Sonatas*, musical works, or compositions before mentioned, together with the said accompaniment to the latter: and had lately in the name

of

of the said *John Christian Bach*, but without his licence or consent, printed, published, and sold for profit, divers copies of the said two several compositions and accompaniment. And it likewise appeared, that it was possible to know the musical compositions of any master or composer of musick, who had composed any quantity thereof. The question was, Whether a *musical composition* is within the statute of the 8th of *Ann. c.* 19. intitled an act for the encouragement of learning, by vesting the copies of printed books in the authors, or purchasers, of such copies during the times therein mentioned? 1777. BACH *versus* LONGMAN.

Mr. *Robinson* for the plaintiff—Mr. *Wood* for the defendant.

Lord *Mansfield* called on Mr. *Wood* to begin; and without hearing Mr. *Robinson* in answer, said, the case was so clear and the arguments such, that it was difficult to speak seriously upon it. The words of the act of parliament are very large: "*Books* "and *other writings*." It is not confined to language or letters. Music is a science; it may be *written*; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the act. Afterwards, on *Monday*, *June* 16th, the court certified in these words, "Having heard counsel and considered this case, "we are of opinion, that a musical composition is a *writing* "within the statute of the 8th of Queen *Anne*, intitled an act "for the encouragement of learning, by vesting the copies of "printed books in the authors or purchasers of such copies, "during the times therein mentioned."

JONES *versus* WALKER.

Same day.

Old-street is within the *suburbs* of the city of *London*, being connected to it by a street of *contiguous* buildings, *before* the stat. 9 *Ann. c.* 10. Therefore the *penny post-office* is entitled only to *one* penny for the carriage and delivery of a letter to any of the inhabitants thereof; *viz.* the *penny* paid *upon putting* such letter *into* the *penny-post-office*.

THIS was a special action on the case, for *money had and received* to the plaintiff's use. Plea, *Non assumpsit.*—The cause was tried at *Westminster*, at the sittings after *Easter* term, 1777, before Lord *Mansfield*, when the Jury found a verdict for the plaintiff, damages 1 *d.* costs 40 *s.* subject to the opinion of the

1777. the court upon the following case: That by the stat 5 *Ann. c.* 10. intitled "an act for establishing a general post-office," it was enacted "that it should, and might be lawful for the post-master "general, &c. to demand and take for the post of all and every "the letters and packets passing or repassing by the carriage called "the *Penny-post*, established and settled within the cities of *London* and *Westminster*, and borough of *Southwark*, and *parts* "*adjacent*, and to be received and delivered within *ten English* "*miles* distant from the general letter-office in *London*, *one penny*."—That by the stat. 4 *Geo.* 2. *c.* 33. intitled an act for obviating a doubt which hath arisen concerning the usual allowance made upon the delivery of letters sent by the penny-post, to places *out* of the cities of *London* and *Westminster*, and borough of *Southwark*, and the *respective suburbs* thereof, reciting, that *whereas*, upon the first establishment of the penny-post-office, the carriage of letters by that post was confined to the cities of *London* and *Westminster*, the borough of *Southwark* and the *respective suburbs* thereof; and *whereas*, upon the *application* of the inhabitants of several towns and places within the compass of ten miles round the city of *London*, upon their *voluntary offer* to allow and pay to the messengers or persons carrying such letters, in consideration of their being obliged to travel with a horse to places at that distance, *one penny*, upon the delivery of every letter directed to any person at any place *out* of the cities of *London* and *Westminster* and borough of *Southwark*, and the *respective suburbs* thereof, *over and above the penny* paid upon putting every such letter into the penny-post-office in *London*; the carriage of letters and packets by the said penny-post was *extended ten* miles round the city of *London*; and *one penny* hath been constantly allowed to, and taken by such messengers, on the delivery of every letter directed to every person at any place *out* of the cities of *London* and *Westminster*, the borough of *Southwark*, and the *respective suburbs* thereof, over and above the penny paid upon putting such letter into the penny-post-office in *London*. And reciting, that *whereas*, by reason of the provisions contained in the stat. 9 *Ann. c.* 10. some doubts had arisen, whether the messengers, carrying such letters, could lawfully receive the said penny, over and above the penny paid upon putting such letter into the penny-post-office in *London*; *For obviating and taking away all such doubts*, It was *enacted*, "that nothing, in the said act, should extend to restrain any such "messenger from demanding or taking for every letter originally "sent

JONES *versus* WALKER.

" ſent by the penny-poſt, and not firſt paſſing by the general-poſt, " and from thence tranſmitted by the penny-poſt, which had " been, or ſhould be, delivered, to or for any perſon, at any place " *out* of the cities of *London* and *Weſtminſter*, the borough of " *Southwark*, and the *reſpective ſuburbs* thereof, *one penny*, over " and above the penny paid upon putting every ſuch letter into " the penny-poſt-office."

That the houſe of the plaintiff is ſituate in *Old-ſtreet, in the county of Middleſex;* which ſtreet, *before* the ſtat 9 *Ann.* was *adjoined* to *London* by *contiguous* buildings. That the *liberties* of the city of *London* extend beyond the walls thereof; but that *Old-ſtreet* is *no part* of any of the ſaid *liberties*. That *over and above* the penny paid upon putting in a letter ſent by the penny-poſt to the plaintiff, a penny was *demanded* and paid on the *delivery* thereof. The queſtion was, Whether the *ſecond* penny could be legally *demanded?*

Serjeant *Walker* for the defendant, who was called upon by Lord *Mansfield* to begin, objected 1ſt, that the moſt material, and indeed the only fact to entitle the plaintiff to recover, was *not* ſtated; namely, that the plaintiff lived *within the ſuburbs* of the city. The court therefore could not give judgment for him. 2*dly*. That from the facts that were found, it was clear he did *not* live within the ſuburbs: *Old-ſtreet* being expreſsly ſtated to be *out* of the *liberties* of the city, and *in the county of Middleſex*. That the *liberties* and the *ſuburbs* were *ſynonimous*. But ſuppoſing they were not; *before* the ſtat. 4 *Geo.* 2. *c.* 33. it was mere curteſy to pay the *extra* penny: The uſage therefore, both before and ſince the ſtat. 4 *Geo.* 2. was material to ſhew whether the curteſy extended to this place at the time, and whether it had been ſubmitted to, as a demand, ſince: And there was no doubt but the uſage was with the defendant.

Lord MANSFIELD.—Uſage has nothing to do with the preſent caſe. The ſingle queſtion is, whether " ſuburbs" mean the liberties, or contiguous buildings at the time of the ſtat. 9 *Ann.* For if *Old-ſtreet* had been joined to *London ſince* that time, it would be liable to pay the *extra* penny. One ſide of *Oxford-road* does not pay, becauſe it was *then* joined to *London* by buildings: The other does, becauſe it was at that time open fields. One ſtrong argument againſt its being conſtrued to mean liberties, is, that the ſtatute mentions *Weſtminſter* and the *borough of Southwark*, which have no liberties.

Mr.

1777. Mr. *Buller contra* for the plaintiff. In *Fellows* v. *Jeacock*, *Mich*. 9 *Geo*. 3. MSS. the signification of the word "suburbs" was settled to be, the same as the *suburbana* of *Rome*. Lord *Mansfield* in that case asked the Recorder, whether "suburbs" was the technical term. He said, no: The technical term was "*liberties*." He cited 2 *Vern*. 431. *Stow's Survey*, vol. 2. p. in which *Old-street* is mentioned as part of the suburbs of the city of *London*; and the stat. 9 *Ann*. *c*. 22. for building 50 new churches, in or near the cities of *London* and *Westminster* and the suburbs thereof, under which, *Old-street* church was built.

JONES *versus* WALKER.

Lord MANSFIELD.—The statute 9 *Ann*. *c*. 10. which erected the penny-post-office, confines the limits of its delivery to "the "cities of *London* and *Westminster*, the borough of *Southwark* "and the parts adjacent." In process of time, the inhabitants of towns and villages within the compass of ten miles of *London*, (*not*, persons resident in the contiguous streets and buildings) wishing to partake of the benefit of this mode of conveyance, made application to the penny-post-office, requesting it might be extended to them, and, as an inducement to the post-office to comply with their request, offered to pay an additional penny a letter, towards defraying the expence of horse-hire, necessary on account of the distance. The post-office indulged them in it.—After this it became a doubt, whether the receipt of this additional penny for letters thus carried and delivered in the country, could be authorized, consistent with the general provisions contained in the stat. 9 *Ann*. *c*. 10: and therefore the stat. 4 *Geo*. 2. *c*. 33. was passed, making it lawful to take an additional penny, for the delivery of any letter to any person *out* of the cities of *London* and *Westminster*, the borough of *Southwark*, and the *respective* *suburbs* thereof.—The question however, What is meant by "suburbs?" still remains; and that is a question of construction upon the act of parliament. At the trial it was contended by the counsel for the penny-post-office, that *suburbs* mean *liberties*, and have relation to the franchises of the city. It was roundly asserted by *both* parties, that the usage and practice was with *them*. Serjeant *Walker*, for the defendant, insisted, that the additional penny had always been paid by the inhabitants of *Old-street*. Mr. *Dunning*, for the plaintiff, that it had not: But no evidence to the fact was produced; the witnesses on both sides being out of the way. I thought, and it was acquiesced in and agreed on all hands, that

that it being clear and certain, that *Old-street* was connected to London by a street of *contiguous* buildings *before* the stat. 9 *Ann. c.* 10. the usage could be of no avail in explaining the statute. If the usage had been, that a *single* penny only had been taken, in one part of the street, and the additional penny in another, it might have been material to shew, that the one part was antiently contiguous to *London*, and the other originally in the country. The question then, is a mere question of construction, whether the word " suburbs" in the act, means the liberties of the city, or contiguous buildings. In all dictionaries, " suburbs" are defined to be, " buildings adjoining to a great city, *without* " *the walls*." I thought at the trial, and think now, there is not a colour for saying that suburbs mean liberties. Liberties are a *corporate* denomination: Suburbs, a *natural* denomination. In *Fellows* v. *Jeacock*, which was the case of the *Hampstead* waterworks, the court were of opinion, that suburbs did not mean liberties: And to prove the place in question there, a contiguous building, evidence was given of there being antient pipes, &c.—Whether the place in question was or was not a contiguous building at the time of the act, is, as has been said, a matter of *fact*: But when once it is proved to have been a contiguous building, it is a question of construction upon the act. The franchises of the city can have nothing to do with the additional trouble of the Penny post-man: Whether a house stood on this side or that side of *Temple-bar*, within or without the liberty of the city, could make no difference to him. The only matter for his consideration was, Whether it stood amongst other houses contiguous to the city, or *without* it, so as to occasion his taking a horse, the original consideration for allowing the additional penny.

1777.

JONES *versus* WALKER.

ASTON, Justice.—The usage is not material in this case. I think that upon the words of the stat. 9 *Ann. c.* 10. which says, " parts adjacent," it is clear, that the inhabitants of *Old-street* would be entitled to have the letters delivered for *one penny* only. The confusion that has arisen, was introduced by the latter statute, the 4 *Geo.* 2. *c.* 33. changing the words, and using " suburbs" instead of " parts adjacent." It also departs from the distance mentioned in the stat. 9 *Ann. c.* 10. of " ten miles " from the general letter office in *London*," and says " within " the compass of ten miles *round* the city of *London*," which seems to me, to include ten miles beyond the city and the places adjacent where the *old* penny was taken. I think that *before* the

1777. the stat. 9th of *Anne*, one penny only could have have been taken in *Old street*, and therefore, that the Post-office cannot take an additional penny [illegible]

Jones v. Walker

Willes Justice.—I think the word "*suburbs*" in the latter statute (4 *Geo.* 2. c. 33.) [illegible] the same as "parts adjacent" in the stat. 9 *Anne* c. 10. If it had been the constant uniform usage to receive an additional penny in this place, it might make a difference, but usage here, is out of the case, for none is stated.

Ashhurst Justice.—I am of the same opinion.

Per Cur. *Postea* delivered to the *plaintiff*.

Rust *et al.* Assignees of Henry and Richard Potts *v.* Cooper.

IN trover the jury found a verdict for the plaintiffs, damages 375*l.* [illegible] 40s. subject to the opinion of the court on the following case.

[illegible] the defendant [illegible] The bankrupts [illegible] of the year 1772, owing [illegible] The defendant, on the [illegible] 1772, [illegible] bankrupt 1,000*l.* upon [illegible] one [illegible] 1772, met Mr. [illegible] from [illegible] acceptances for [illegible] bankrupts, at [illegible] where they [illegible] upon [illegible] being taken out against [illegible] should be made to one Mr. [illegible] On *Richard Potts'* return [illegible] *Monday* the 21st of *September* [illegible] as usual; but on that [illegible] would be obliged to stop payment in a few days. On [illegible] the 25th of *September* in the afternoon, [illegible] shut up his shop and not open it [illegible] morning, but recollecting himself, he bid him open [illegible] till the post came in, which [illegible] of the morning of the 26th, when *Richard Potts* ordered the doors to be shut, and that he should be denied. He was accordingly denied that day, *before* which time, he had committed *no* act of bankruptcy. *In contemplation of this, and in order to give* [illegible] *a preference, Richard*

chard Papps made a bill of parcels to the defendant, bearing date the 22d of *September* 1772, and delivered it to the defendant on the 24th. The bill of parcels with an order to Mr. *J. Elderton* (in whose possession the goods were deposited by the bankrupts to sell for them) to deliver the goods unsold, and to pay the money arising from the sale of such as might have been sold to the order of the defendant, together with orders to three other persons to deliver goods in their possession to the amount of 684 *l.* to the defendant, were sent by the defendant express to *Messrs. Grace and Kennedy* in *London;* which arrived on the 24th of *September*; and on the 25th the goods in question were delivered by *Elderton* to Messrs. *Grace* and *Kennedy*, to the use, and as the property of the defendant *Cooper*. The three other persons delivered no part of the goods in their possession. The defendant never dealt in such goods as were in the possession of *Elderton*, and at the time of the delivery of the bill of parcels, the bankrupts were insolvent.

1777. RUST *et al. versus* COOPER.

The question was, Whether the plaintiffs were entitled to recover the value of the goods?

Mr. *Wood* for the plaintiffs. The question is, Whether the act done in this case, being in *contemplation of bankruptcy*, and with a view to give the defendant a *preference*, was not a fraud upon the rest of the creditors, and therefore void? Nothing can be clearer, than that the bankrupt laws intended to put all creditors upon an equal footing. And therefore, though in *general*, a trader, *before* any act of bankruptcy committed, has such a property in, and power over, his effects, as to do acts which by consequence may give one creditor a preference to another; yet, if he is *insolvent*, or has an act of *bankruptcy* in *contemplation*, he can do no act *out of the usual course of trade*, in favour of a particular creditor. This doctrine is not new, it is established by a variety of cases: But more particularly in the case of *Alderson* v. *Temple*, 4 *Bur.* 2,235. and in *Harman* v. *Fishar. B. R. Trin.* 14 *Geo.* 3.*—Here, the act done was clearly not in the course of trade; not obtained by threats, nor at the instance, or importunity of the creditor; but entirely voluntary: And to make an act void, it is not necessary it should be fraudulent as between the parties; it is sufficient if it be a fraud upon the creditors *generally*. It is expressly stated to be in contemplation of bankruptcy. The petitioning creditor was fixed upon: The bill of sale antedated; and falsely purporting to be in the *course of trade*; whereas, there had been no dealings of this kind between the bankrupt and the

**Supra*, 117.

1777. RUST *et al. versus* COOPER.

defendant before; and in order to expedite the delivery of the goods before the act of bankruptcy was complete, the bankrupt sent them by express. The *sole motive* therefore, was to give a *preference*; and consequently, though a conveyance of only *part* of his effects, was void in respect of the other creditors. He cited *Linton* v. *Bartlett*, *C. B.* from a MSS. note of Mr. Justice *Gould*, as expresly in point *: And prayed the court to give judgment in favour of the plaintiffs.

* *Vide* this case in 3 *Wilf.* 47. cited also in *Harman* v. *Fiſhar*, *ſupra*, 117.

Mr. *Peckham contra*, for the defendant. I am to contend that the defendant, being a *bonâ fide* creditor, and payment being made to him *before* any act of bankruptcy committed, has a right to retain what was so paid him by his debtor, though by way of preference to him, and in contemplation of bankruptcy: And whether such payment be in *money* or *goods* makes no difference. (Lord *Mansfield*. The difference between *money* and *goods* is immense.) Suppose the payment had been in bank notes, which in law are not considered as money, or payment, any more than a bale of goods; it would not have been void: And here, there was an order to deliver the *money* to the creditor if the goods were sold. It was by accident only that he received the goods. But he was actually *in possession* of *them*, *before* any act of bankruptcy committed; and *possession* is the *line* to be drawn. So is *Twine's* case, 3 *Co.* 81. It is a good payment therefore at common law: It has none of the characteristics of fraud enumerated in *Twine*'s case; and the bankrupt laws do not extend to it. They only avoid transfers of property to persons who have no good title or claim. Stat. 34 & 35 *Hen.* 8. *c.* 34.—13 *Eliz. c.* 7.—1 *Jac.* 1. *c.* 15. But this is neither a grant, nor conveyance, nor fraudulent. The provision in the stat. 21 *Jac.* 1. *c.* 19. *sect.* 11. which subjects goods, conveyed by a bankrupt to persons upon good consideration, if left in the bankrupt's possession, to be sold for payment of his debts; proves, that where the *possession* is *parted* with, as in this case, they shall not be so liable. The 9th section of the same statute, which provides that judgment creditors, &c. where execution, &c. is not *executed*, shall be relieved only *pro ratâ* with the rest of the creditors, favours this position: And that distinction was adopted by Lord *Mansfield* in *Worsley* v. *De Mattos* †. "It is the policy of the bankrupt laws to level all creditors, who have not actually recovered satisfaction, or got hold of a pledge which the bankrupt could not defeat." But here, the transaction is founded upon a *good* consideration; the *property* was actually *transferred* to the defendant; and the *act complete*, *before* the bankruptcy: therefore,

fore, within the ground of determination also in 1 *Str.* 165. *Barwick*'s case. Till the post came in on the *Saturday*, *Papps* was not certain he should break. The debt is a *bonâ fide* debt, and the consideration highly meritorious: the money being advanced merely to save the bankrupt from sinking. The assignment is of *part* only, and the preference fair at the time: therefore good. *Small* v. *Oudley*, 2 *P. Wms.* 427. and the cases there cited. *Hague* v. *Rolleston*, 4 *Bur.* 2,174. *Alderson* v. *Temple*, 4 *Bur.* 2,235. *Harman* v. *Fishar*, *Trin.* 14 *Geo.* 3. *B. R.* *—As to the case of *Linton* v. *Bartlett*, it is plainly distinguishable from the present, the whole transaction there, being manifestly fraudulent throughout.—Here, fraud is out of the case; the preference was made to a *bonâ fide*, and a meritorious creditor, and the act complete. There certainly ought to be a line drawn; otherwise, there can be no security in any dealings. That line can only be legally and properly drawn, where the act is *complete* before the bankruptcy. That being indisputably the case here, the defendant is entitled to retain the goods delivered to him in payment of a just demand; and therefore, the plantiffs ought not to recover.

1777.

RUST *et al.* *versus* COOPER.

**Supra*, 117.

Lord MANSFIELD.—Perhaps there is no case exactly parallel to this, in all its circumstances.

This is a case, where the assent of the creditor to the act of the bankrupt, and the delivery of the goods to the order of the creditor, is complete, before the act of bankruptcy committed; and, further, it is the case of an *act* done not of a *deed*. In all its circumstances therefore, there is perhaps no case exactly similar to it. But the law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them. The general principle applicable to the present case is this; that a fraudulent contrivance, with a view to defeat the bankrupt laws, is void, and annuls the act. This principle is established by many cases.

Every case that has determined a conveyance by a trader of his *whole* effects to pay a creditor to be an act of bankruptcy, proceeds on this foundation; that it is fraudulent against the bankrupt laws, and therefore void. Every case which says, it is an act of bankruptcy if *one* creditor only is *excepted* out of such conveyance, goes upon the same principle. It was long ago determined, that a conveyance of *all a man's effects* was clearly a fraudulent conveyance; and leaving out something, or a part, by way of colour, will not mend it. But the case in the *Com-*

1777.

RUST *et al.* *versus* COOPER.

mon Pleas * went further than any former case; for there, the conveyance of a *third* part of the bankrupt's effects only, and a fair transaction with the *party*, was held to be fraudulent and void as against the rest of the creditors; and being *by deed*, was in *itself* an *act of bankruptcy*. And no doubt, in that case, which was a bill of sale, if it was fraudulent at all, it must likewise be an act of bankruptcy. That case was well and fully considered.

* Linton *v.* Bartlet, 3 *Wils* 47.

But I am of opinion that no fraudulent transaction, which is not a deed, is in itself an act of bankruptcy. But then such a transaction is void. Where a sale of goods is fraudulent, and done with no other view whatsoever but to defeat the equality of the bankrupt laws, it is void on account of such intended fraud. I will take to be true, in this case, what Mr. *Peckham* has said, that the defendant is most probably a meritorious creditor; for the bankrupt, just after the failure of *Fordyce*, was in tottering circumstances; and the defendant on the 1st *August*, 1772, lent him 1,000 *l.* on his bond. It is therefore highly probable to have been a friendly act on the part of the defendant. But still, that will not warrant the transaction on the part of the bankrupt, if it is a fraud on the bankrupt laws. Nothing could be more meritorious than the case of *Fisher* † the creditor, in the question which arose upon *Fordyce's* bankruptcy. And therefore, the court was sorry to determine against him; but the law must prevail for the sake of example.

Now, let us see, whether the transaction in this case is a mere fraudulent contrivance, with no other view whatsoever but to defeat the consequences of a certain bankruptcy. In the first place, it is stated to have been, "expressly in contemplation of "that bankruptcy, which was certain; for the bankrupt had "previously concerted that a commission of bankruptcy should "be taken out against him, knowing he could not stand:" and one of the creditors, with whom this was planned, said, at the trial, "he himself would have got a preference too, if "he thought by law he could have done so." Further, it was agreed that a particular person should be the petitioning creditor. When he returned to *Salisbury*, he continued in the same tottering situation, and told his clerk he must break; he had once resolved to break on the *Friday*, but he recollected afterwards, that it should not be until the next day: And for this evident reason; if he had broken on the *Friday*, he would have become bankrupt too soon; for it was as much as ever he could do to get the goods delivered to his friend on the *Friday*. How

does

does this case stand then? Was there any application on the part of the creditor? Was the money become due? Did the creditor demand payment? Did he threaten process if the bankrupt did not pay? Not one of these circumstances appear. On the contrary, the whole was transacted behind the back of the creditor: and, without any previous communication, without any previous transaction or stipulation, a bill of parcels is made out, which bears date on the 22d of *September*, but was not delivered until the 24th. The next thing is, it purports to be a bill of sale of goods at particular prices. That is not true. No prices were agreed on: The defendant knew nothing of the matter. This bill of parcels is delivered to the defendant upon the 24th. With what view? It must be to apprize the defendant that he meant to secure him. Again, there is no receipt on the bond. It is impossible to consider this as a sale; it must be a *[illegible]*; a plank to save: the goods are to a much larger amount than the principal and interest due on the bond. There is nothing that carries the face of a sale upon it; no receipt, no transaction, no acknowledgment in discharge of the bond, no account. The whole is a secret clandestine contrivance, with no other view or intention than to give a preference, and to defeat the consequences of a certain bankruptcy, though it purports to be a *bonâ fide* sale.

1777.
Rust et Al. versus Cooper.

Another excessively strong circumstance is, that the defendant never bought, or dealt in, this kind of goods; and moreover, they were, at the time, in the hands of the bankrupt's agent.

There is a fundamental distinction between an act like this, and one done in the common course of business. The statutes have relation back only to the act of bankruptcy. And I consider here, that there is no act of bankruptcy till the 26th. If, in a fair course of business, a man pays a creditor who *comes to be paid*, notwithstanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair transaction in the course of business, the payment is good; for the preference is there got *consequentially*, not by design: It is not the *object*; but the preference is obtained, in consequence of the payment being made at that time.

Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods, and delivers possession; *that* is, and, at any time, may be, a transaction in the common course of business, without the creditor's knowing there is

1777. RUST et al. versus COOPER

any act of bankruptcy in contemplation; and therefore, good. It is not to be affected by what passes in the mind of the bankrupt. But, in the present case, there is not a single thing but what is a step towards fraud, and a proof of an intended preference: And to support it, would be to overturn the whole system of the bankrupt laws. The present therefore, is a fraudulent sale upon all the other creditors, and all the laws concerning bankrupts.

The present determination will not affect the case of a fair mortgage of goods delivered, arising out of a transaction in the common course of business. It will only affect cases, where there is no object but that of defeating the bankrupt laws, and committing a fraud on all the other creditors.

ASTON Justice.—Nothing but a number of authorities cited to throw a cloud over the question, can make one lose sight of the fraud in this case. It is a mere contrivance betwixt the creditor and debtor. It has been contended to be a payment; but it is clearly no payment, nor sale. It was a sudden thought to make out a bill of sale in form; but, there is no truth in it. The bankrupt had ordered goods to the amount of 600*l.* to be delivered in the same way, which would have amounted to more than principal and interest upon the bond. If the bankrupt had paid what was due on the bond in bank-notes or money, and had taken up the bond, I think there might be an argument in that case, as to the fairness of the payment. But this was done without demand; not in a common course of dealing; and the bond was left in the hands of the creditor, without any receipt taken upon it. I do not know where such a preference as this is to stop. There is no case which says, a preference shall be confined to a single creditor. If a trader may prefer one, he may prefer more. The present transaction is not in itself an act of bankruptcy; but not being a payment in the regular and common course of dealing and business, it is a fraudulent transaction, and therefore, void with respect to the other creditors.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* were of the same opinion.

Per cur. Postea be delivered to the plaintiff.

1777.

Same day.

RICH, Executor, *versus* COE *et al.*

Though the *master* of a vessel, be also *lessee* of it, by agreement with the *owners*, for a *term of years*, under covenants on *their* part, that *he* shall have the *sole management* of the ship, and employ her for his own *sole benefit*, &c. and on *his* part, that he shall repair her at his *own sole cost* and charge, &c. the *owners* are still liable for *necessaries* furnished for the ship by order of the master, tho' without their knowledge, or without their being known to the person who supplied them.

ASSUMPSIT, for goods sold and delivered by the plaintiff's testator to the defendants; also, for work and labour done, materials found, and on an account stated. Plea: The general issue.—The cause came on to be tried at the Sittings after *Easter* Term 1777, at *Guildhall*, *London*, before Lord *Mansfield*, when the jury found a verdict for the plaintiff, damages 5 *l.* 8 *s.* 3 *d.* costs 40 *s.* subject to the opinion of the court upon the following case:——That *Thomas Rich*, the elder, and *Thomas Rich*, the younger, being rope-makers, did, on the 21st of *November* 1772, supply the ship *Henry* and *Thomas*, with cables, to the value of 5 *l.* 8 *s.* 3 *d.* by the order of *Thomas Harwood*, the captain; and made *Harwood*, and the *owners of the ship* (the defendants), debtors in the usual manner, without naming the owners, or knowing particularly who they were.———The ship *Henry* and *Thomas* was *let* by the defendants to *Harwood* upon certain articles, in which it was mutually covenanted between them as follows: 1st, The owners covenanted with *Harwood*, that, on his performance of the covenants stipulated on his part, he should have the sole management of the ship, and *employ her* for his own *sole benefit* and advantage, for the space of eleven years, if he should so long live, and the ship should not be lost. The covenants, on the part of *Harwood*, were, to pay a *yearly rent* of 36 *l.* *per annum*, at stated periods: That he would at all times, at his *own cost and charge*, *repair*, maintain and keep the vessel, and her tackle, rigging, &c. in good and sufficient repair: That he would not do or omit any thing, which might subject her to be *taken*, *seized*, or *forfeited*: with a *proviso*, that in case the said rent should be in arrear for the space of twenty-one days after any of the days appointed for payment; or in case *Harwood* should die, or should *not in all things fulfil and keep* all and singular *the* said *covenants*, &c. then, it should be lawful for the owners to *take possession* of the ship.—The case then stated, that neither the plaintiff's testator, nor his partner, had any *notice* of this contract at the time they furnished *Harwood* the captain, with the goods.—The question was, Whether the defendants were liable to this debt? If the court should be of opinion that the defendants were liable, then the verdict was to be entered up for the plaintiff, with damages 5 *l.* 8 *s.* 3 *d.* and costs 40 *s.* But if the court should be of opinion

1777. nion that the defendants were not liable, then a nonsuit was to be entered.

RICH *versus* COE *et al.* Mr. *Bower* for the plaintiff, insisted, that under the circumstances of this case the defendants were clearly liable. That the master of a vessel, from the nature of his employment, is intrusted with more powers to contract for his owners, than any other person, who, like him, comes under the denomination of a servant. He may pawn the ship for necessaries: And his general authority is such, that, in case of necessity, he may do every thing which the owners themselves could, if they were personally present. In consequence of this authority, he gains credit wherever he goes: And persons in trade, though totally unacquainted with the real owners, trust him upon the visible property of the ship itself. This is the general law and the course of trade. The question therefore is, Whether the contract between the master and the owners in this case, can make any difference. Supposing it could, as between the master and owners, in respect of *third* persons, it is merely fraudulent and void. He was proceeding to shew this, and to enforce it by arguments of inconvenience to trade, if the law were otherwise, when the court called upon the counsel on the other side to go on.

Mr. *Peckham* for the defendants, began by observing, that though the matter in dispute was very immaterial with respect to the present parties, the general question involved in it, was of the greatest moment to the whole county of *Essex*; it being almost an universal custom in that part of the kingdom, for persons to rent ships for the purpose of letting them out to hire. He said the question seemed to be, Whether the plaintiff was entitled to come upon the defendants, for the value of goods which they had never ordered, and from which they could not possibly receive any benefit? Or, Whether he ought not rather to resort to the master of the ship, who *did* contract for them; to whose order the goods were delivered; who alone was to receive the benefit of them; and to whom alone the credit could have been given, in as much as the owners were entirely unknown to the plaintiff? The principle upon which the law in general holds the owner of a ship to be concluded by, and *liable* for, the *contract* of the *master* is, that the master is considered merely as a *servant* of the owner without any property in the ship itself. *Molloy de jure Marit.* 228. " At common law the master of a " ship has no property, general or special, by being constituted " master." But the same author, *page* 224. *sect.* 10. says, " If

"If a *master* take up money to mend or victual the ship, when "there is *no occasion*; though, *generally* the owners shall answer "the fact of the master, yet here, they shall *not*, but only the "master: For it is but reasonable, that the person advancing his "money should take care that he lends it upon such an occasion, "as that the master's act shall bind the owner."—Here then, it was incumbent upon the plaintiff, to see whether this was such an occasion as ought to make the master's act binding upon the owners. And if he had done so, he would upon enquiry have found, that the master in this case, was both master and owner. Indeed, it was almost impossible for him not to have known, that it is the uniform custom in this country for the masters to be lessees of their ships; and to exercise an exclusive right over the vessel during the whole term, without the least interference, interruption, or direction from the owners whatever. As all the cases, which hold the owner to be liable for the act of the master, go expresly upon the ground of the master being merely a servant placed by the owner; the necessary inference in this case is, that being in the *nature* of *owner*, as well as *master*, he *alone* is liable. *Malyne, Lex Mercator*. 102. In *Morse* v. *Slue*, 1 *Mod.* 85. 2 *Lev.* 69. S. C. it was adjudged against the owners, because they received the freight, and the master acted merely as their servant. In this case *Harwood* alone received the freight. In *Boson* v. *Sandford*, 3 *Mod.* 321. 1 *Show.* 29, 103. S. C. Part owners, not privy to the contract of the master, were held liable, "because they took upon themselves the fitting out of "the ship;" and *per Holt*, C. J. "they are chargeable as *em-* "*ploying*, and having the benefit of the voyage; *not* by reason "of their *interest*, because some may disagree." But here, the owners, during the term, can neither take upon themselves the charge of the ship, nor the fitting her out; they cannot meddle with her without subjecting themselves to an action of trespass; they are to have no benefit from the freight or profits of the voyage; nor have even an interest in her till after the expiration of the term. What distinction then can there be, between the lessee of a ship, and a lessee of a house; or the case of a person who lets a coach to hire for a twelvemonth? Neither the landlord nor owner, in such a case, is liable for the repairs to be done by the lessee, or the person hiring the coach. The great ground of distinction in this case is, that the *master, during the term*, is the *owner*; he acts as such in every respect, is universally known and considered as the only person concerned in the conduct,

1777.

RICH *versus* COX *et al.*

care,

1777. care, or management of the ship, and therefore ought alone to be responsible.—He concluded with praying that a nonsuit might be entered: But if the court had any doubt, desired it might be spoken to again, as it was a question of great importance, and counsel were attending to take notes.

Rich *versus* Coe *et al.*

Lord MANSFIELD.—I am very well satisfied that no addition can be made to the arguments urged on behalf of the defendants. The special case was reserved, not with a view to the particular matter in dispute, or the parties now before the court; but, in consideration of a general anxiety in the owners of ships employed in this trade, to know how far they are by law liable for the acts of their respective lessees. In that point of view, we have considered the case very particularly; and after the fullest deliberation we think it impossible to say, that the plaintiff is not entitled to recover.—Whoever supplies a ship with necessaries, has a *treble* security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not.—1. The master is personally liable, as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him: They run the risk, and they say, whom they will trust with the appointment and office of master. Suppose, the owners in this case had delivered the value of the goods in question in specie to the master, with directions for him to pay it over to the creditors, and the master had embezzled the money; it would have been no concern of the creditors: For they trust *specifically* to the *ship*, and *generally* to the *owners*. In this case, the defendants are the owners; and there happens to be a private agreement between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But, how does that affect the creditors, who, it is expressly stated were total strangers to the transaction? And *that* is an answer to the observation, that the plaintiff must have known the real situation of the master in this case, from the general usage and custom of the country in that respect. To be sure, if it appeared that a tradesman had notice of such a contract, and, in consequence of it, gave credit to the captain individually as the *responsible person*, particular circumstances of that sort might afford a ground to say, he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated, that the plaintiff had no notice whatever of the contract. The owners themselves are aware of their being liable at the

time.

1777.

Rich *versus* Coe *et al.*

time. They chuse a master to whom they agree to let the ship; and trust for their security to the covenants which they oblige him to enter into. These covenants are, that he shall keep the ship in repair, and deliver her up at the end of the term, in as good condition, as when delivered to him. This is not all: for they indemnify themselves against the private debts of the master; and against his being taken in execution: For, if he does not perform all and every the covenants in the agreement (except in case of the loss of the ship), the consequence, besides their remedy against him upon the covenant, is, that the contract and agreement is to be absolutely at an end, and they are to take possession of the ship.

Suppose the ship had been impounded in the *Admiralty Court*, and *that* had happened at the end of the term; or, suppose the captain had then broken a covenant which had put an end to the agreement, the defendants could never have taken the ship out of the court, without paying the debt for which the ship was impounded. We are all of opinion therefore, that under these circumstances there is no colour to say that the creditors should be stript of the general security they are by law entitled to against the owners.

Per cur. Postea to be delivered to the plaintiff.

CREPPS *versus* DURDEN *et al.*

Saturday, June 14th.

A person can commit but *one* offence on the *same* day, by "*exercising his ordinary calling on a Sunday*," contrary to the stat. 29 *Car* 2. c. 7. And, if a justice of peace proceed to convict him in *more* than *one* penalty for the *same* day, it is an excess of jurisdiction for which an action will lie, *before* the convictions are quashed.

THIS was an action of trespass brought by the plaintiff against the defendants, for breaking into his house and taking away his goods and converting them to his own use: To this the general issue was pleaded, and the cause came on to be tried at *Westminster*, before Lord *Mansfield*, at the Sittings after *Easter* Term 1777; when a verdict was found for the plaintiff, for *three* several sums of *five shillings* each, and costs 40 *s.* subject to the opinion of the court upon the following case:— "That the plaintiff was convicted of selling *small hot loaves of* "*bread*, the same not being any work of charity, on the *same* "day (being *Sunday*)" by *four separate* convictions, which were as follow: "*Westminster* to wit. Be it remembered, That on "the 10th of *November*, 1776, *Peter Crepps*, of, &c. baker and "salter of bread, is lawfully convicted before me *Jonathan Dur-* "*den*, one of his Majesty's Justices of the Peace for the said city "and liberty of *Westminster*, for unlawfully doing and exercising

"certain

1777. "certain worldly labour, business, and work of his ordinary cal-
"ling of a baker in the parish aforesaid, by selling of small hot

CREPPS *versus* DURDEN.

"loaves of bread, commonly called rolls, the same not being any "work of necessity or charity, on the said 10th of *November*, being "the *Lord's day*, commonly called *Sunday*, contrary to the statute "in that case made and provided; for which offence, I the said "*Jonathan Durden*, have adjudged, and do hereby adjudge, the "said *Peter Crepps* to have forfeited the sum of five shillings."

The three other convictions were *verbatim* the same, without any variation. The case then proceeded to state, that the defendant *Durden* issued the four warrants, afterwards stated, to the other defendants, who by virtue of those warrants levied the four penalties of five shillings each, and the expences. The first of these four warrants ran thus: *Westminster to wit.* To the constables of *St. James* in the city and liberty of *Westminster.* —Whereas information has been made before me *Jonathan Durden*, one of his Majesty's justices of the peace for the city liberty of *Westminster*, that *Peter Crepps*, baker, of, &c. did on the 10th day of *November* 1776, being the *Lord's day*, commonly called *Sunday*, *exercise his trade* and ordinary calling *of a baker*, by selling hot loaves of bread, contrary to the statute in that case made and provided; and whereas, the said *Peter Crepps* has been duly summoned to appear before me, to answer to the said information; but has contemptuously refused to appear to answer the contents thereof; and *whereas*, upon full examination, and upon the oath of *J. H.* the said *Peter Crepps* was lawfully convicted before me, of the offence aforesaid, whereby he has incurred the penalty of five shillings pursuant to the statute in that case made and provided, therefore, &c. &c.— The words of the other three warrants were *verbatim* the same.

The first question reserved was, Whether in this action, and before the convictions were quashed, an objection could be made to their legality? If no objection could be made, then a *nonsuit* was to be entered. But in case an objection to their legality might be made, then the question was, Whether the levy under the three last warrants could be justified? If not justifiable, a verdict was to be entered for the plaintiff, with 15 *s.* damages, and 40 s. costs; if justifiable, then a verdict was to be entered for the defendants.

Mr. *Buller* for the plaintiff, as to the first point, insisted, that wherever a conviction is in itself clearly bad, it is open to the party to take objection to it in an action against the justice; and it is no answer on his part to say, that the conviction is not quashed,

quashed, or in force; because it is incumbent upon him to shew the regularity of his own proceedings. That there were several cases to this purpose; and though they were decisions at *nisi prius*, yet, as they were uniform in laying down the same doctrine, they ought to have considerable weight in this case. The first he should mention, was *Hill* v. *Bateman*, 1 *Str.* 711; *not* for the principal matter adjudged, but because it was agreed on all hands, in that case, as a *settled point*, "that in all actions "against justices of peace, they must shew the regularity of "their proceedings." He added, that he had a manuscript note of the same case, to the same purport. In a case of *Moult* v. *Jennings*, *coram Lee* C. J. upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared, that the plaintiff had been convicted of swearing; and *Eyre* said, if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. In *Stanbury* v. *Bolt*, *coram Fortescue*, J. *Trin.* 11 *Geo.* 1. upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned; and the conviction was adjudged void for that reason only.—In *Cole's* case, Sir *William Jones* 170. it was held by the whole court, "that if a justice does not pursue the "form prescribed by the statute, the party need not bring error, "but all is void, and *coram non judice*." There are other authorities in which it has been held, that an action will lie, even though the conviction is good in point of form, if it is not supported by the truth and justice of the case. There was one in *Shropshire* before *Gould* Justice; where the plaintiff had been convicted upon the game laws, and the conviction itself good in point of form. But the party was not in truth an object of the game laws; whereupon *Gould* directed the jury to find for the plaintiff, which they accordingly did. There was another case in *Lancashire*, before Mr. Justice *Gould*, to the same effect. In *criminal* cases, it is clear, that the conviction being *good* in point of form, is no protection to the justice; and if not, why should it be so in a *civil* action? If he convict illegally, he ought not to be sheltered, and an action is the only mode of redress to the party injured. But, if the formality of the conviction is to be an answer to the action, the party injured would be without redress, where he would be most entitled to it; because the caution of the justice to be correct in form, would increase in proportion to his intention to act illegally. In *Bruckleshury* v. *Smith*, 2 *Bur.*

1777. 656. every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat.

Crepps *versus* Dearden. 7 *Jac.* 1. *c.* 5. which enables justices of peace to plead the general issue, and to give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal: or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause of demurrer. Since the statute, his defence must be equally good in evidence: for the statute does not vary the law; it only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal.—*Secondly*, upon the *merits*: The words of the stat. 29 *Car.* 2. *c.* 7. are, "that no tradesman or other person shall do or "exercise any worldly labour, business, or work of their or-"dinary calling on the *Lord's day*, works of necessity and "charity only excepted." In *Rex* v. *Cox*, 2 *Bur.* 786. the court held "that *baking puddings* and *pies* was within the ex-"ception;" and if so, why should not the baking *rolls* be so too? But what is decisive is, that the statute 29 *Car.* 2. *c.* 7. gives no summary form of conviction; whereas, the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of *form* therefore, all *four* are bad.—*Lastly*, supposing they were good in form, the *three* last are an *excess* of the justice's jurisdiction: for the offence created by the statute is, "exercising his calling on the *Lord's day*." If the plaintiff therefore had continued baking from morning till night, it would still be but *one* offence. Here, there are four convictions for one and the same offence; consequently, as to three, there is an excess of jurisdiction: and if so, all is void, and *coram non judice*; and an action will lie, not only against the justice, but likewise against the officers. To this point he cited *Hardres* 484. and concluded by praying judgment for the plaintiff.

Mr. *T. Cowper contra*, for the defendant, contended, 1. That by the bare production of the conviction at the trial, the cause was at an end, and the court estopped from any further enquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction

1777.

CREPPS *versus* DURDEN.

viction, in a matter of which the justice had jurisdiction, must be removed by *certiorari* and quashed, before it can be questioned at *nisi prius*. If he has no jurisdiction, no doubt but all is *coram non judice* and void. But here, the justice had jurisdiction; and if so, with deference to the opinion of Mr. Justice *Gould*, in the cause tried before him in *Shropshire*, the conviction, as to the *matter of fact* contained in it, is *conclusive* in favour of the justice in an *action*, though it is not so in an *information*. If it were not, instead of the mischief to be apprehended from the oppression of the justice, no one would act in the commission. 2. As to the objections which have been taken to the convictions in point of form, he said, it would be time enough to answer them, when the convictions were removed and stood in the paper for argument. At present, it was sufficient to observe, that they continued as so many *judgments on record*, and, as such, *conclusive*, till reversed by appeal, or quashed by this court. He agreed the stat. 7 *Jac.* 1. *c.* 5. did not vary the law: But insisted, that *before* that statute, it would have been a good plea for the defendant to have stated, that the plaintiff was convicted, &c. as in this case; and if the plaintiff had traversed the conviction, the defendant might have demurred. The sole ground and object of taking away the *certiorari* in the several acts of parliament for that purpose, was to prevent vexatious suits against justices for mere informalities in their proceedings. But they still remain liable to an information if they wilfully act wrong. This court has often lamented, when obliged to quash a conviction for want of form, because it opens a door to an action.

As to this being but *one* continued offence, it might be, that it was carried on at four different places, for there is evidence of four different acts, and the court will not presume the contrary against the justice. But, if the nature of the offence is such, that it could only be committed *once* in the same day, still the plaintiff has no remedy while the convictions are in force, but by removing them into this court to be quashed for illegality.

Lord MANSFIELD.—May there not be this point, that the justice had *no jurisdiction after* convicting the plaintiff in the *first* penalty? The act of parliament gives authority, to punish a man for exercising his ordinary calling on *Sunday*. The justice exercises his jurisdiction, by convicting him in the penalty for so doing. But then, he has proceeded to convict him for three other offences in

1777. on the same day.——Mr. *Cowper.* If he has done so, it is only a ground for quashing the convictions: But no priority appears, to give legality to one in preference to the other.—Lord *Mansfield.* This point you agree in; that if the justice had no jurisdiction, it is open to enquiry in an action: Now, if there are *four* convictions, for *one* and the *same* offence committed on *one* and the *same* day, *three* of them must necessarily be *bad*; and if so, it does not signify as to the merits of the action, which of the four is legal, or which illegal.

CREPPS versus DURDEN.

I do not remember that at the trial it was contended, that the plaintiff would be entitled to recover if the convictions were informal: Or, that any objection was taken to their formality there. The single question intended to be tried was, Whether there could be more than one penalty incurred, for exercising a man's ordinary calling on one and the same *Sunday*. As to that, there can be no doubt: The only doubt was, Whether that objection could be taken at the trial, before the convictions were quashed. In the extent in which the argument upon that point has proceeded, it is a matter of considerable consequence; and, as a general question, I should be glad to think of it.

ASTON Justice.—The court will never grant an *information*, unless the conviction is quashed. *Rex* v. *Heber.* 2 *Str.* 915. As to the general question before the court, suppose the justice were to convict for a single offence, where no offence at all had been committed; would not an action lie in that case? If it would, why not in this, where there are four convictions for one and the same offence? It seems to me, that the baking every roll might as well have been charged as a separate offence.

Cur. adv. vult.

Afterwards, on *Wednesday, June* 18th in this term, Lord *Mansfield*, after stating the case at large, delivered the unanimous opinion of the court as follows. Upon the trial of this cause, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reason; because, by the state I have of them, they appear different from the warrants: For the *convictions* take *no* notice of any summons, nor of any informations, nor of any evidence upon oath given; though the *warrants* take *notice* of a summons, of the defendant's not appearing to that summons, of an information laid, and evidence given upon oath. This objection would have gone to *all* the *four* cases equally; but, at the trial, no objection whatever

ever was made to the first conviction or warrant. But the objection made was this; that, allowing the first conviction and warrant to be good, the *three* others were an *excess* of the jurisdiction of the justice, and beyond it: For that on the true construction of the stat. 29 *Car.* 2. *c.* 7. there can be but one offence, attended with one single penalty, on the same day.

1777. Crepps *versus* Durden.

In answer to this it was objected, on the part of the defendants, that *no* such *objection* could be taken to the convictions till after they had been *quashed* in this court; and that if a case were to be made with regard to that, it must be taken upon the question; Whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the court on the present case are, first, "Whether in this action, and *before* the convictions were *quashed*, an objection could be made to their legality? If the court "should be of opinion no objection could be made, then a non-"suit to be entered up: but, in case the objection might be "made, then, 2dly, Whether the levy made under the *three last* "warrants could be justified?" The first question is, "Whether any objection can be made to the legality of the convic"tions before they were quashed?" In order to see whether it can, we will state the objection: It is this; that here are *three* convictions of a *Baker*, for exercising his trade on *one* and the *same* day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but *one* penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence is, "exercising his ordinary "trade upon the *Lord's day*;" and *that*, without any fractions of a day, hours, or minutes. It is but *one* entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or of a number of particular acts. The penalty incurred by this offence is, *five shillings*. There is no idea conveyed by the act itself, that, if a taylor sews on the *Lord's day*, every stitch he takes is a separate offence; or, if a shoe-maker or carpenter work for different customers at different times on the same *Sunday*, that those are so many separate and distinct offences. There can be but one entire offence on one and the same day: And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: Killing a single hare is an offence; but the killing ten more on

1777. CRIPPS *versus* DURDEN.

the ſame day will not multiply the offence, or the penalty impoſed by the ſtatute for killing one. Here, repeated offences are not the object which the legiſlature had in view in making the ſtatute: But ſingly, to puniſh a man for exerciſing his ordinary trade and calling on a *Sunday*. Upon this conſtruction the juſtice had no juriſdiction whatever in reſpect of the three laſt convictions. How then can there be a doubt but that the plaintiff might take this objection at the trial? 2dly. With regard to the form of the defence, though the ſtat. 7 *Jac.* 1. *c.* 5. enables juſtices of peace to plead the general iſſue and give the ſpecial matter in evidence; in doing ſo, it only allows them to give *that* in evidence, which they muſt *before* have *pleaded*; and therefore, they muſt ſtill juſtify. But what could the juſtification have been in this caſe, if any had been attempted to be ſet up? It could only have been this: That becauſe the plaintiff had been convicted of one offence on that day, therefore the juſtice had convicted him in *three* other offences for the ſame act. By law that is no juſtification: It is *illegal* on the *face* of it; and therefore, as was very rightly admitted by the counſel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer muſt have been ſo adjudged. Moſt clearly then it was open to the plaintiff upon the general iſſue, to take advantage of it at the trial. The queſtion does not turn upon niceties; upon a computation how many hours diſtant the ſeveral bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that reſpect, they ſhould all four be held bad: But it goes upon the ground, that the offence itſelf can be committed only once in the ſame day. We are therefore all clearly of opinion, that if there was no juriſdiction in the juſtice, the ſame might have appeared at the trial: Of courſe, we are of opinion, that this objection might have been made, and that the objection itſelf, in point of law, is well-founded.

Per Cur. Poſtea to be delivered to the plaintiff.

1777.

Saturday, June 14th.

REX *versus* BALME *et al.*

The power of two justices, under the stat. 13 *Geo.* 3. *c.* 78. *sect.* 16. to order ANY *highway* to be *widened*, extends to roads repairable *ratione tenuræ*: and, upon disobedience to such order, the party may either be proceeded against summarily under the statute, or by indictment.

THIS was an indictment against the defendants, who were surveyors of the high-way for the township of *Bradford*, in the county of *York*, for *disobedience to an order of two justices* made upon them pursuant to the stat. 13 *Geo.* 3. *c.* 78. intitled, "an act to explain, amend, and reduce into one act of parliament, the several statutes now in being for the amendment and preservation of the *public highways*, &c."—The 16th section of the statute, empowers two justices, upon view, to order *narrow* highways to be *widened* and enlarged. The indictment accordingly stated, "that two justices did, upon view, make such an order, and that the defendants wilfully and contemptuously neglected and refused to obey it." The defendants pleaded, that certain persons particularly named in the plea, were bound *ratione tenuræ* to repair the said highway, and had always used and been accustomed to repair it; and that, inasmuch as the inhabitants of the township of *Bradford*, at the time of making the said order, were not, nor are liable to repair the said highway, or any part of it, the said order was, and is void, and of no effect. To this, there was a demurrer, and joinder in demurrer.

Mr. *Wood pro rege*, stated the question to be, whether the stat. 13 *Geo.* 3. *c.* 78. empowers justices to widen roads repairable by private persons *ratione tenuræ*; and he contended it did. That the words of the 16th section, by which this power is particularly given, were *general*; "that if it shall appear upon view of two or more justices, &c. that the ground or soil of *any highway* between the fences thereof is not of sufficient breadth, they may order it to be *widened* and enlarged, or *diverted* and *turned*:" Consequently it must extend to roads repairable *ratione tenuræ* as well as to other highways. But, by section 23. it is quite clear; for *that* expressly provides "that the justices, upon information by the surveyor, that any highway liable to be repaired *ratione tenuræ* is out of repair, may order it to be repaired within a limited time, &c." They have clearly therefore a jurisdiction over such roads, and the act was meant to extend to them. But if the court should entertain a doubt upon the construction of this act, the stat. 13 *Geo.* 3. *c.* 84. (the general turnpike act) has, by reference to the stat. 13 *Geo.* 3. *c.* 78, shewn what the powers of the justices

1777. by that statute are. For in sect. 62. after reciting, that "whereas "many persons are liable by tenure, &c. to repair certain *highways* which have *become turnpike* roads, and therefore are "liable to *additional expence* in repairing them;" it provides, "that "the trustees shall contribute towards the expence out of the "tolls, &c." And in the next section (63.) reciting, that "whereas "parts of highways, &c. have been *diverted* by legal authority, and "doubts have arisen, or may arise, whether the inhabitants of "any parish liable to repair the old highway by statute duty, "*tenure*, or otherwise, ought to repair or contribute thereto, &c." to obviate such doubts, it enacts, "that such persons shall be "liable to repair so much of the new highway as shall be equal "to the burthen of the old, &c." This is *decisive*; for though this latter statute does not use the words "*widen* and *enlarge*," yet the section of the stat. 13 *Geo*. 3. *c*. 78. to which it refers in respect of the power of diverting roads, is the very section which empowers the justices to widen and enlarge roads that are too narrow. It would be too much therefore to suppose, that the legislature meant to give the justices a power in the one case, and to restrain them from interfering in the other. He prayed judgment therefore for the crown.

Rex *versus* Balme.

Mr. *Chambre contra*, for the defendant, contended, that the provisions of the stat. 13 *Geo*. 3. *c*. 78. relative to the widening narrow highways, did not extend to roads repairable by private persons *ratione tenuræ*. 1st, The words of sect. 15. are confined to cases where "the ground between the fences will admit of "the width directed by the statute; and where the road leads to "a market-town." Sect. 16. makes no mention of roads repairable *ratione tenuræ*: And as to sect. 33. it provides only for the *repair* of such roads, but says nothing of their being widened. There is not a word therefore in the act which relates to it. With respect to the clauses that have been cited from the stat. 13 *Geo*. 3. *c*. 84. they relate only to turnpike roads, the direction and management of which is vested in trustees, and special powers are given them for that purpose. The justices have no jurisdiction in such cases. But 2dly, Supposing they had; there is a particular provision by the stat. 13 *Geo*. 3. *c*. 78. *sect*. 50. imposing a fine not exceeding 5 *l*. nor less than 10 *s*. in cases where no particular penalty is before imposed: And no particular penalty is imposed in this case. Therefore this provision ought to have been pursued, and not the remedy by indictment.

Lord

Lord MANSFIELD—As to the mode of profecution, difobeying an order of juftices is a common law offence, and therefore punifhable by indictment. 1777. Rex verfus BALME.

The next queftion is, Whether the order of juftices is legal? It would be a ftrange conftruction of the ftatute, if it were not. By the general turnpike act 13 *Geo.* 3. *c.* 84. *fect.* 63, if a perfon is liable to repair a road *ratione tenuræ*, and the road is *diverted* under the ftat. 13 *Geo.* 3. *c.* 78. *fect.* 16, fuch perfon is to contribute towards the repair of it when diverted, in equal proportion to what he was liable to before. Now the very fame *fect.* (16.) that empowers the juftices to *divert* or turn an old road, gives them likewife a power of *widening* fuch as are too narrow; It would be monftrous therefore to fay, that when the legiflature was directing that perfons, liable *ratione tenuræ* to repair roads diverted, fhould contribute in the fame proportion as formerly, they did not mean they fhould contribute towards widening fuch as required widening.

ASTON Juftice.—I am of the fame opinion. The 15th fection of the ftat. 18 *Geo.* 3. *c.* 78. is *compulfory* upon the furveyors "to "make every public cartway leading to any market-town, twenty "feet wide, *&c.* if the ground between the fences will admit of "it." Can there be a doubt then, if fuch road were repairable *ratione tenuræ*, that the perfon liable before, would be ftill liable in the proportion he formerly was? The next claufe (fect. 16.) is not confined to a road leading to a market town, but is *general*; "if *any* highway, *&c.*" Thefe words are clearly large enough to include *all* roads.—As to the mode of profecution, there is no doubt but the juftices may proceed fummarily under the act if they think proper: But they may elect to profecute at common law; for difobedience to an order of juftices is an offence at common law. The penalty given by the ftatute is only accumulative. And he cited *Rex* v. *Robinfon*, 2 *Bur.* 799.

Per Cur. Judgment *pro Rege.*

THE END OF TRINITY TERM.

1777. # MICHAELMAS TERM

18 George III. *B. R.* 1777.

Tuesday Nov. 11th.

Adams *versus* Adams *et al.*

THIS was a case out of *Chancery* for the opinion of this court, stating in substance as follows: That *Francis Freeman* died intestate *before* the year 1758, leaving two daughters, his only children and *coheirs* at law, *viz. Frances*, afterwards the wife of *Shute Adams*, and *Catherine*, the wife of Sir *Onesiphorus Paul*, and seised in fee of the estate in question, and of other real estates.

1758, *November* 3.—By indenture between the said Sir *Onesiphorus Paul* and *Catherine* his wife, and *Shute Adams* and *Frances* his wif , of the one part, and *Joseph Blisset* and *John Taylor* of the other part, the said Sir *Onesiphorus Paul* and *Shute Adams* did covenant, that they and their said wives should levy three or more fines (and which were accordingly levied) of all the said estates to the following uses; (that is to say) "As to *one undivided moiety* to the *use* of such person or persons, for such estate or "estates, and for such uses as the said Sir *Onesiphorus Paul* and "*Catherine* his wife should by any deed or writing jointly limit "or appoint; and in default of appointment, to particular uses "therein mentioned. And as to the *other half part*, to the *use* "of *such person* or persons, *for such estate* or estates, as the said "*Shute Adams* or *Frances* his wife, by any *deed* or *writing* to be "by them *jointly* executed in the presence of two witnesses, should "from time to time direct and appoint; and for *want of such* direction and *appointment*, to the use of the said *Shute Adams for* "*life*, remainder to said *Frances for life*, remainder to *Joseph Blisset* and *John Taylor* and their heirs for the life of the survivor of *Shute Adams* and *Frances* his wife, *in trust* to pre-

"serve

"serve contingent remainders; remainder, to the use of *such* 1777.
"*child or children*, by the said *Shute Adams* on the body of the said
"*Frances* begotten or to be begotten, and *for such estate* or estates
"as they should *jointly*, or as the *survivor*, in case of no joint ap-
"pointment, should by *deed* or *writing*, or as the survivor should
"by *will* attested by three witnesses, limit, direct, or *appoint*,
"give or *devise* the same; and for want of such direction or
"appointment, gift or devise, to the use of the *first* and *every*
"*other son* of the said *Shute Adams* and *Frances* his wife, severally
"and successively in tail; remainder, to all the daughters of the
"said *Shute Adams* and *Frances* his wife in tail, as tenants in
"common. Remainder, to such person or persons as the said
"*Frances Adams*, whether covert or sole, by any deed or deeds,
"should release, direct or appoint; and in default of such ap-
"pointment, to the right heirs of the said *Frances*."

ADAMS *v.* JUS ADAMS.

1758, *November* 29th.—By deed poll under the hands and seals of *Shute Adams* and *Frances* his wife attested by two witnesses, reciting the said first mentioned power of appointment in the deed of the 3d of *November*, 1758, the said *Shute Adams* and *Frances* his wife *did* direct and *appoint* the said undivided moiety of the said estates and premises, to the use of the said *Shute Adams for life*, remainder to *Frances* his wife *for life*, remainder to *Joseph Blissett* and *John Taylor* and their heirs to support contingent remainders, remainder to the *use of such child or children* of the said *Shute Adams* on the body of the said *Frances* begotten or to be begotten, *and for such estate or estates* as they should *jointly* by deed or writing attested by two witnesses, or as the *survivor* in case of no joint appointment should by *deed* attested by two witnesses, or *will* attested by three witnesses, grant release, limit or *appoint*, give or *devise* the same: And in *default* of such appointment, to *all such children living at the death of the survivor* of said *Shute Adams* and *Frances* his wife, equally as tenants in common in tail, with cross remainders amongst them; remainder, to the use of said *Shute Adams* and *Frances* his wife, and the survivor, and the heirs and assigns of the survivor for ever—With a *power* in *Shute Adams* and *Frances* his wife *jointly* by deed with two witnesses, to *revoke* the above uses, and to limit any other uses by deed executed in the presence of two witnesses. And a *power* in the *survivor* to *join* in a *partition* of the premises, or to sell the said undivided moiety, investing the money in other lands to be settled to the same uses.

1764,

1777.

ADAMS *versus* ADAMS.

1764, *September* 24th.—By articles of agreement between Sir *Onesiphorus Paul* and dame *Catherine* his wife, of the first part, and *Shute Adams* and *Frances* his wife, of the other part, reciting as therein it was recited, it was agreed, and the said Sir *Onesiphorus Paul* and *Catherine* his wife, *Shute Adams* and *Frances* his wife, did thereby severally and respectively limit, order, direct and appoint, that all the premises in *Clifton* and *Westbury* upon *Trym* should be, and remain to, and for such and the like uses, trusts, intents and purposes as were mentioned with respect to them the said *Shute Adams* and *Frances* his wife concerning their or the said *Frances*'s undivided moiety of the whole of Mr. *Freeman*'s estate, by the said indenture dated the *third* day of *November* 1758, made between the said Sir *Onesiphorus Paul* and his wife, and the said *Shute Adams* and his wife, of the one part, and the said *Joseph Blisset* and *John Taylor* of the other part. And it was also agreed, that the other estates should be limited, &c. to the same uses as were mentioned with respect to the said Sir *Onesiphorus Paul* and dame *Catherine* his wife, concerning their share of the said estates by the said deed dated the 3d day of *November* 1758. And that a proper deed or deeds, for dividing and allotting the said estates, agreeable to the intention of the said parties, should be forthwith prepared and executed by the said parties: neither of the deeds of 3d of *November* and 29th of *November* 1758, was recited in these articles, or mentioned therein otherwise than as aforesaid.

1761, *October* 20th—By indenture between Sir *Onesiphorus Paul* and dame *Catherine* his wife, and *Shute Adams*, Esq; and *Frances* his wife, of the one part, and *Joseph Blisset* of the other part, reciting the indenture of the 3d of *November*, 1758, (but not the indenture of the 29th of *November*, 1758,) and also reciting the said division of the premises; *Onesiphorus Paul* and dame *Catherine*, in consideration of five shillings paid by the said *Shute Adams* and wife, and of five shillings paid by *Joseph Blisset*, by virtue of all powers in the said indenture of the 3d of *November* 1758, and of all other powers, did by consent, direction and appointment of the said *Shute Adams* and wife, limit, direct and appoint unto the said *Joseph Blisset*, his heirs and assigns, "All the undivided moiety of them the said *Onesiphorus* "*Paul* and dame *Catherine* his wife, of and in the estate at *Clifton* "and *Westbury* upon *Trym*, *to hold* unto the said *Joseph Blisset*, "his heirs and assigns for ever, to the several *uses* following, "*viz*. To the use of such person or persons, and for such estate or "estates,

"estates, as the said *Shute Adams* and *Frances* his wife should by "any deed or writing from time to time release or appoint, and "in default of such joint appointment, which was the case, to "the use of the said *Shute Adams* for his life. Remainder to "*Frances* his wife, for her life; remainder to *Joseph Blisset* and "his heirs, to preserve contingent remainders; remainder to "the use of such child or children of the said *Shute Adams*, be-"gotten or to be begotten on the body of the said *Frances* his "wife, and for such estate or estates as they by deed or writing "under both their hands and seals, or as the survivor of them, "in case of no joint appointment, by deed or writing under "the hand and seal of such survivor attested by two witnesses, "or as such survivor by will should limit or appoint; and if no "appointment, then to their first and other sons in tail; re-"mainder to the daughters, as tenants in common in tail, with "cross remainders; remainder to the use of such persons as "the said *Frances*, whether covert or sole, should appoint: "remainder to the right heirs of the said *Frances Adams*." Soon after this, *Shute Adams* died, leaving three children and no more by the said *Frances*, his wife, namely, *Francis* their only son, and *Mary Shute Adams*, and *Catherine Adams*.

1777

ADAMS *versus* ADAMS.

4th *July* 1767.—By indenture of three parts between the said *Frances Adams*, the widow of the said *Shute Adams*, of the first part, *Joseph Blisset* of the second part, and the said *Francis Adams*, *Mary Shute Adams*, and *Catherine Adams* of the third part, and duly executed by the said *Frances* in the presence of and attested by two witnesses; reciting the deed of the third of *November*, 1758; and the indenture dated 20th *October*, 1764, and also, that by the said deed-poll dated 29th *November*, 1758, the premises there stood limited &c.; and that *Shute Adams* was dead, and that no other appointment had been executed: The said *Frances Adams*, in pursuance of the power to her reserved by the said several recited indentures and deed-poll, and of all other powers, did grant, limit, direct and appoint the said two several moieties, or half parts of the said estates at *Clifton*, and *Westbury upon Trym*, to the *use* of the said *Mary Shute Adams* and *Catherine Adams*, the daughters, for 500 years, to commence from the death of the said *Francis Adams*, subject to the proviso after mentioned; remainder to the use of her son the said *Francis Adams*, his heirs and assigns for ever. *Proviso*, if the son should pay the daughters 3000 *l*. each, or 6000 *l*. to the survivor, the said term to cease. With the following power reserved to the said *Frances Adams* to revoke that appointment. *Provided* lastly, and the said *Frances Adams* doth hereby reserve to herself

1777. ADAMS *versus* ADAMS.

herself full power and authority to revoke these presents, and to limit all and singular the premises to, or between, the said children, or any or either of them, in such manner and for such estate or estates as she shall think fit.

25th *October*, 1771.—By indenture of three parts between said *Frances Adams*, widow, of the first part, *John Freeman*, junior, and the Reverend *George Wilkins*, of the second part, and *Mary Shute Adams*, and *Catharine Adams*, of the third part, and executed by the said *Frances Adams*, in the presence of and attested by two witnesses —Reciting the deeds of the 3d *November*, 1758, 20th *October*, 1764, deed-poll of 29th of *November*, 1758, and the indenture of 4th *July*, 1767, and the proviso in the last deed to revoke, she, the said *Frances Adams*, in pursuance of the power reserved to her by the said recited indenture and deed-poll, and all other authorities, did grant and appoint the premises subject to her own estate for life, and the proviso after mentioned, as to *one moiety*, to the use of the said *Mary Shute Adams*, her eldest daughter for life; remainder to the trustees and their heirs to preserve remainders; remainder to the first and other sons of the said *Mary Shute Adams*, in tail male, remainder to the daughters of the said *Mary Shute Adams*, in tail general, as tenants in common with cross remainders; remainder to the said *Catherine Adams*, the youngest daughter for her life; remainder to the trustees to preserve remainders; remainder to her sons and daughters in the same manner; remainder to the use of the right heirs of the said *Frances* for ever. And *as to the other moiety*, to the *use* of the said *Catherine Adams* for life. Remainder to trustees to preserve remainders; remainder to her *first* and other sons in tail; remainder to her daughters in tail general, as tenants in common with cross remainders, with remainder to the said *Mary Shute Adams*, the eldest daughter for life, and afterwards, to her sons and daughters in manner aforesaid, with a last remainder to the right heirs of the said *Frances Adams*, in the same manner as the first limited moiety. In this deed also, *power was reserved* to Mrs. *Adams*, the mother, to *revoke* and appoint anew; but she never executed such power.

In *January*, 1775, Mrs *Adams* died intestate, leaving her said three children surviving her. The son and one of the daughters have already attained the age of 21 years; and the youngest daughter is of age within a few months.—The question was, Whether the plaintiff *Francis Adams* took any, and what estate in the premises in question under the several deeds and instruments, and deeds of appointment, or any of them?

Mr.

Mr. *Mansfield*, for the plaintiff, made *three* points, and insisted, 1st, That no power of revocation being reserved in the deed of the 20th of *October*, 1764, enabling the survivor of the husband and wife to make an appointment of the estate in question, the widow, by the deed of appointment 4th *July* 1767, had fully executed her power; consequently, the subsequent deed of the 25th *October*, 1771, was entirely null and void *in toto*: And the plaintiff, under the prior deed of the 4th *July*, 1767, was entitled to a fee in the premises in question, subject to the term therein mentioned. 2dly, Supposing *Frances Adams* the survivor could from time to time revoke any former appointment; under the words of the power, she clearly could appoint to *children only*, and not to *grand-children*; *Alexander* v. *Alexander*, 2 *Vezey*, 640. (This was admitted on the other side) therefore, the deed of the 25th of *October*, 1771, was void *pro tanto*. If so the question was, what estate *Francis Adams* the son would then take? and he contended, 3dly, That he took an estate tail in the whole premises, subject to the estates for life to his two sisters; for that the deed of the 29th *November*, 1758, was revoked by the articles of agreement of 24th *September*, 1764, and that by those articles and by the deed of the 20th *October*, 1764, the first deed of the 3d of *November*, 1758, was revived and set up.

Serjeant *Heath*, *contra*, for the defendants contended, 1st, That the deed of the 24th of *September*, 1764, did not revoke the deed of appointment of the 29th *November*, 1758. That it was merely a deed of partition in pursuance of an express power of partition reserved in the deed of 29th of *November*, 1758, and therefore, could neither in legal operation, nor consistently with the intention of the parties, be construed to destroy it. 2dly, That there being *no power* of *revocation* reserved in the *original deed* of the 3d of *November*, 1758, creating the power of appointment, and that power having been once executed by the deed of the 29th *November*, 1758, it was at an end. And therefore, even if it had been the intention of the parties to revoke the uses of that deed, they had no power to do so. *Heli* v. *Bond*. 1 *Eq. Cas. Abr.* 342. Consequently, the plaintiff, by default of any joint appointment having been made, could at most be entitled only to an estate tail *jointly* with his sisters, as tenants in common with cross remainders, as directed in such case by the deed of 29th of *November*, 1758.—Afterwards, on *Saturday November* 22d, in this term, the court certified their opinion to the court of *Chancery* in these words: "Having heard counsel on both sides and considered

1777. Adams *versus* Adams.

"sidered this case, we are of opinion that the deed of the 29th "of *November*, 1758, is revoked by the subsequent instruments "of the 24th of *September*, and the 20th of *October*, 1764. And "we think, that the appointment made by *Frances Adams*, the "widow, who survived her husband, dated the 4th *July*, 1767, is "revoked by the deed of 25th *October*, 1771. And as to the last-"mentioned deed, though we are of opinion, that she has thereby "*exceeded* her power, which was confined to *child* or *children*, by "limiting estates to her *grand-children*, yet we think, that the "same ought to prevail so far as her power extended; and that "the limitation to her daughters for life is good: But, that the dis-"position of the inheritance to their child or children is void. "Therefore we are of opinion, that as there is no appointment of "the inheritance of the premises, that the son *Francis Adams* "took an estate tail therein, subject to the estates for life to his "sisters, with remainders over, under the deeds of the 24th *Sep-*"*tember*, and the 20th *October*, 1764, and which limitations "seem agreeable to the intention of the parties when they exe-"cuted the first deed of the 3d of *November*, 1758."

Friday, *Nov.* 14th.

DENN *ex dim.* GASKIN *versus* GASKIN.

Willes Justice absent.

THIS was an action of trespass and ejectment for lands and tenements in *Dalston*, in the county of *Cumberland*, to which the defendant pleaded the general issue; and at the trial it appeared in evidence as follows:

One devises thus: "*As to all such worldly estate as GOD has endued me with*," I give and bequeath as follows.—I give and devise, *All that my freehold messuage and tenement lying in G.* together with all houses, &c. and appurtenances whatsoever belonging to the same to *M. R. G. R.* and *T. R.* *equally*: And then bequeaths, amongst other pecuniary legacies, *ten shillings* to his *heir at law*.—The devisees are *tenants in common*, and take an estate for *life* only.

That *Jonathan Gaskin*, being seised in fee of the premises in question, by his will bearing date the 30th of *March*, 1736, gave and devised in manner following: "*As to all such worldly* "*estate as GOD has endued me with*, I give and bequeath as fol-"lows: I give, bequeath and devise, *all that my freehold messuage* "*and tenement*, lying in *Gaitsgill*, in the parish of *Dalston*, to-"gether with all houses, barns, orchards, edifices and appurte-"nances whatsoever, reputed as part thereof or belonging to the "same, unto *Matthew Robinson*, *George Robinson*, and *Thomas* "*Robinson*, *equally* to them my sister's sons." The testator then, after bequeathing several small pecuniary legacies to most of his relations, gave to *John Gaskin* (the lessor of the plaintiff and his *heir at law*) *ten shillings*; all the rest of his goods, chattels, and personal estate whatsoever, he gave to *Matthew*, *George*, and *Tho-*

mas Robinson before mentioned, and revoked all former wills.—That the said *Jonathan Gaskin*, the testator, died seised of the premises in question, leaving the lessor of the plaintiff his heir at law, who was then, and ever since hath been, resident in *Ireland*. That *George Robinson* died in 1749, and *Matthew* died in 1762; and that *Thomas*, the other devisee, is still living. Whereupon a verdict was given for the plaintiff, subject to the opinion of the court upon the following question; Whether the lessor of the plaintiff was entitled to recover any, and what part of the premises comprized in the declaration?

1777. Denn *versus* Gaskin.

Mr. *Bolton* for the lessor of the plaintiff, argued, 1. That by the devise to the testator's *three* nephews, *Matthew*, *George*, and *Thomas*, they took only an estate for *life*, in the premises in question. 2. That they took as *tenants in common* only, and not as jointenants; and consequently, by the death of *Matthew* and *George*, the lessor of the plaintiff was entitled to *two thirds* of the whole estate.—As to the 1st point, he said, it never yet was contended that the devise of a "messuage or tenement" without any words of limitation added, or words descriptive of the quantity of interest the testator possessed, as "all my estate "and interest therein," or the like, could convey more than an estate for life. But if that were doubtful, the subsequent words "lying in *Gartsgill*" make this case clear, for they are manifestly a description of the locality only, not of the quantity of estate intended to be devised. The only circumstance from whence it is possible in this case to infer an *enlargement* of the estate to the devisees, is the legacy of *ten shillings* to the heir at law. But that alone is not sufficient to disinherit him.—The next question is, Whether the devisees took as tenants in common, or as jointenants? As to that, the words are, "*equally* to "them my sister's sons." The words, "equally to be divided" have always been held a tenancy in common. 1 *P. Wms.* 14. And "equally" means the same thing. *Cro. El.* 695. 2 *Rol. Abr.* 89. 1 *Eq. Cas. Abr.* 292. *pl.* 10. 2 *Vez.* 252. Therefore, he prayed judgment for the plaintiff, for two thirds of the devised premises.—He added, that a third question might possibly be made, whether the lessor of the plaintiff was not barred by the statute of limitations; if it should, a decisive answer would be, that ever since his title accrued, the lessor of the plaintiff had been resident in *Ireland*: therefore the statute could not run: and cited 1 *Show.* 91. as in point to this purpose.

Mr.

1777. Mr. *Wood contra*, for the defendant, said, the only point he should consider was, Whether the devisees took an estate in fee, or for life only; and he contended that, upon the whole of the will taken together, it was clear the testator meant they should take a *fee*. *First*, the introduction prefatory to the devise in question was very material: " *as to all such worldly estate as* " *GOD has endued me with, I give, &c.*" These words manifestly shew the testator meant to dispose of *all* the estate he had; and therefore, though the subsequent words " *lying in* " *Gaitsgill*" might, without such prefatory matter, be considered as descriptive of the *locality* of the estate only; it must, when connected with it, (as in this case) be construed to convey all the interest the testator had in the premises so described. In addition to this, the testator has given a legacy of only 10 *s.* to his heir at law; which is demonstration he meant to disinherit him, as much as if he had said so in express words. All these circumstances prove, beyond a doubt, that the intention of the testator was to give a fee-simple to his nephews, in the premises in question; and if an argument were wanting, the court would supply it from the inconsiderableness of the value, as they did in the case of *Oates, ex dim. Wigfall* v. *Brydon*, 3 *Bur.* 1,895.

DENN *versus* GASKIN.

Lord MANSFIELD.—The ground the court went upon in that case was, that from the nature of the estate, and the words used by the testatrix, they amounted in fact to a *direction to sell* the estate, and divide the produce of it. It was a devise of a house and stable, with the appurtenances, valued *only* at 100 *l.* to *seven* children; and the direction was, that the said house and stable should be " *divided* amongst them." It is settled in devises, as well as in deeds, that if no words of limitation are added, the devisee can only take an estate for life. Because the law implies a life-estate only, where there are no words of limitation. But as there are no *technical* words necessary in a will, if the testator makes use of what is *tantamount*; as if he says, " I give to such " a one *in fee-simple*," or " *all my estate*," that will carry *all* his *interest* in the land devised. But there must be words in the will to control the rule of law; which I believe, in a variety of cases, thwarts the intention of the testator. I suspect extremely, that in this very case the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He makes them residuary legatees of his personalty, and gives a disinheriting legacy to his heir at law; agreeable to the vulgar notion taken from the *Roman* law, that an heir is cut off with

 a shil-

a shilling. Because, by the *Roman* law, a will that passed by the heir, was called *inofficiosum testamentum*. But the single question is, whether we can find any words in the will to take this case out of the rule of law; if we cannot it must be adhered to. I think it is impossible to find words in this will sufficient to control the rule of law. If the testator had any way connected the introductory part, "*as to all my worldly estate*," with the devise in question, it might have done. But the introduction is only this, "*as to all such worldly estate as GOD* "*has endued me with*, I give to *A. B. &c.* so and so." Suppose he had only given half his property by this will, the introduction would still have been proper: So, if he had given the whole of his landed estate only, without disposing of the residue of his personalty, it would have been equally proper: He does not say in the introduction, that he *means* to dispose of *all* his worldly estate, but that "*with respect to it*," he devises so and so. If he did mean it, the misfortune is, that *quod voluit, non dixit*. Great use has been made of this sort of introduction in wills in favour of the *clear intention* of the testator; and more, in favour of creditors, to make a real estate liable to the debts of a testator. If it were possible to borrow aid from it, in this case, as I strongly incline in favour of the devisees, I would do it here: but there are no words that can *connect* the *devise* of the lands in question with the *introduction* in this case so as to pass the whole interest. Therefore the devisees can only take an *estate for life*. 1777. Den versus Gaskin.

As to the next question, Whether this is a tenancy in common or a joint-tenancy? there is no room for argument. "*Equally*" as well as "*equally* to be divided," implies a division; whereas if they were to take as joint-tenants, there would be no division. I remember arguing a case before Lord *Hardwicke* in support of the opinion of Mr. Justice *Gould*, in 1 *P. Wms.* 14. and against the opinion of Lord *Holt*; and there, Lord *Hardwicke* thought with Mr. Justice *Gould*. It is certainly the better opinion, more liberal, and better founded in law.

Aston Justice.—As to the latter question, the words "equally "to be divided" have been determined to be a *tenancy in common* in a *deed*. With respect to the first point, I really think, from the circumstance of the testator giving 10 *s.* to his heir at law, he meant to disinherit him. But that *alone* is not sufficient, and so it was held in the case of *Wright* on the demise of *Shaw* versus

1777. Dawe *versus* Gaskin.

Russel in Scacc, *Hil.* 1761. and therefore the rule of law must prevail.

Lord *Mansfield* added, that though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else.

ASHHURST Justice.—I am of the same opinion.

Postea to be delivered to the lessor of the plaintiff, and judgment to be entered up for two third parts of the premises in question.

Afterwards, on *Saturday, November* 15th in this term, Mr. Justice *Aston* stated the case of *Wright ex dim. Shaw* versus *Russel*, to have been as follows:—The words of the introduction to the will were "*as touching the disposition of all such worldly estate* "*as it hath pleased GOD to bestow upon me, I give, &c.*" Then the testator gave a house to his grandson *Henry*, and after his decease to *his* two sons *Thomas* and *William*; and then devised to *Thomas Ebb*, the husband of the heir at law, *one shilling*. The question was, Whether *Thomas* and *William* took an estate for *life*, or in *fee*; and the court held they took only an estate *for life*.

BLAKEY *versus* DINSDALE *et al.*

Same day.

Distress cannot be made for the toll of goods *fraudulently* sold *out* of the market, to avoid the toll. But the party injured must bring a *special action on the case*.

THIS was an action of trespass for seizing and taking away the plaintiff's wheat. The defendants pleaded, 1st, The general issue. 2*dly*, That the borough of *Ripon* was an ancient borough; and that within the said borough, from the time whereof the memory of man is not to the contrary, there has been an ancient market, held every *Thursday*, for buying of corn and grain; and that the corporation were entitled to receive for toll, one half pint out of every bushel of corn brought to the market for sale: And then justified the taking as servants of the corporation. 3*d*, Plea, prescribing for toll of all corn brought into the borough of *Ripon*, for sale on a market-day. 4*th*, Plea, prescribing for toll of all *corn brought into* the borough of *Ripon for sale*, in consideration of cleansing and sweeping a large street in the borough, for the receiving and standing of all corn brought within the said borough for sale. Replication, *de injuriâ suâ propriâ absque tali causâ*. The cause was tried at the *Summer* Assizes 1771, for the county of *York*, before Mr. Justice *Gould*, when it appeared in evidence as follows:—That *Thomas Cowper* took a *Chamber* for a year *to keep corn in*, *within the borough of Ripon*; and on *Thursday*, being a *market day*, he called

1777.
BLAKEY *versus* DINSDALE.

on the plaintiff *Blakey at his own house within the borough of Ripon*, which is two hundred yards and upwards from the place called the *Market-place*. They went together to the said *Chamber*, and *Cowper* shewed him a sample of wheat *which he took from sixty bushels* of wheat which he had *in his chamber*, and sold him four quarters of wheat, being thirty-two bushels of wheat, *which he had at his house*, which is *ten miles out of the borough of Ripon*, at five shillings and four-pence *per* bushel; to be delivered at any time within a month, as it suited the conveniency of him the said *Cowper*; and *Blakey* gave *Cowper* a halfpenny to bind the bargain. Afterwards, within the month, it suiting *Cowper*'s conveniency, being on a *Thursday*, the market-day, he sent it by his servant *Hood*, to be delivered at the plaintiff's mill. As he was going through the borough of *Ripon*, by *Todd*'s house, through the place called the *Market-place*, being a common street there, the defendant *Todd* asked *Hood*, "where "he was carrying the corn;" who said "to *Blakey*'s mill."—*Todd* followed the cart into *Blakey*'s fold yard adjoining to the mill, and then *demanded* toll for the corn, which *Blakey* refused: *Todd* went away; he returned with the defendant, *Dinsdale*, who was an officer of the mayor, and a toll-gatherer, when *part of the corn had been unloaded.* The defendants *then* got upon the cart, and took the thirty-two half-pints, as for toll for the thirty-two bushels, from the corn remaining in the cart. As soon as they had taken the corn, *Blakey* resisted them, and endeavoured to take it from them. The remainder of the corn was left with *Blakey*, and he afterwards paid *Cowper* for the whole. Whereupon a verdict was given for the plaintiff, subject to the opinion of the court upon the following question; Whether the plaintiff is entitled to recover upon the general issue? And if the court is of that opinion, then, Whether the facts proved, maintain any, and which of the issues on the part of the defendants? And the verdict to be entered accordingly.

Mr. *Norton* for the plaintiff. The first question is grounded upon an objection taken at the trial, that the plaintiff had not sufficiently proved his property in the corn in question, so as to maintain this action. With respect to that, it is found, that he bought by sample, and paid earnest: which is clearly sufficient to vest the *general* property in him. *Noy's Maxims, p.* 94. *Perkins, sect.* 92. And if so, it is equally clear, that a person in whom the general property of a chattel is, may maintain trespass *vi et armis* for an injury done to it, though he is not in

1777. BLADES versus HIGGS? TINDALE.

in actual possession. *Hodson* versus *Hodson*, *Latch*, 263. *Fisher* versus *Young*, 2 *Bulstr*. 268. But in this case, it was actually carried into the plaintiff's yard, and part unloaded: Therefore there was an actual delivery.——As to the *second* point; Whether the facts found were sufficient to support any of the justifications set up; he contended, that there could be no pretence for saying this corn was *brought* to the *market*, or *within* the borough, for the purpose of *sale* there; without which, unquestionably the defendants could have no right to toll. He supposed the objection would be, that the transaction was a fraud upon the corporation, with a view to elude the toll: But if it were, fraud is a fact, and must be found: The court will not presume it. 11 *Co.* 56, 57. *Cro. Car.* 553. Therefore he prayed judgment for the plaintiff.

Mr. *Chambre contra*, for the defendants, upon the first question contended, that the plaintiff in this case had not such a property in the corn in question, as to entitle him to recover in an action of trespass *vi et armis*. He argued that a possession in *law* is not sufficient: it must be a possession in *fact*. This appears from the doctrine laid down in *Fitzherbert N. B.* 91. *B.* He says, "if the lord of a manor is entitled to waif or stray "within his manor, and another man taketh the waif or "stray out of the manor, the lord shall have an action of tres- "pass for them, and that without any seisure of them be- "fore." This case is put by *Fitzherbert* by way of exception to the general rule; and *exceptio probat regulam*. As to the authorities from *Latch* 263. and 2 *Bulstrode* 268, the plaintiffs, in both those cases, were *executors*; and no doubt an executor may maintain trespass, though not in possession at the time of the injury; for this reason; if *he* were not considered as in possession, no one could be; and therefore the law *throws* the possession upon him. But this is the common case of a sale without delivery, and a trespass committed in the mean while; in which case, the seller is in actual possession: and therefore, alone entitled to bring the action.—As to the second question, he contended that the second justification, *viz.* that this was corn brought into the borough for sale, was sufficiently proved; for that substantially the corn in question was brought within the borough for that purpose. It was brought by sample, which is bringing to market, and was sold to the plaintiff in the borough on a market-day. It was afterwards, on a subsequent market-day, *delivered* to him; and then the contract was complete.

plete. The sale therefore was entirely in the market: And though no fraud is found, it is impossible not to see, that the sole object of the parties in this mode of sale was to elude the toll. It is also impossible not to see, that if this species of contrivance is to prevail, the market must decay for want of profits. He prayed judgment therefore for the defendants, on the third plea.

Lord MANSFIELD.—There is no difficulty in this case. The first question is, as to the possession of the plaintiff; Whether it was such as to entitle him to recover in this action. No doubt but this corn was the plaintiff's property. He might have brought an action for it against the vendor; for the bargain was completely bound by the earnest. Part of the contract was, that it should be delivered within a month; and the seller, before the expiration of the month, delivers it to his servant to carry to the plaintiff's mill. The moment he had done so, it was to all honest purposes, in respect of third persons, delivered to the plaintiff. But what is still stronger in this case is, that it was absolutely brought to the plaintiff's house, and part of it unloaded, before the trespass complained of was committed. That is an *actual*, not a constructive possession.—The next question is, Whether this corn was, *on the day of the trespass complained of*, brought within the borough of *Ripon*, to be sold in the market? The case states directly the contrary; for it states that the contract was made long before; on the *Thursday* when the sample was shewn; and that it was actually sold at that time. The day it was seized for not paying toll, it was only passing through the borough in the road to the plaintiff's mill, which was ten miles off. As to the suggestion that this is a fraud upon the corporation: There are cases in which a man cannot defend himself even by facts ever so strong, in support of a fraud, if the fraud can be got at; but then it must be made appear. If this mode of sale is a fraud upon the toll, the remedy of the corporation is by *special action on the case*. I remember a case of that sort by the city of *London* against persons for bringing corn just by the market, in order to avoid the toll; and on a special action upon the case the fraud was found. But this case, as stated, is a very different thing. Here, the vendor lives in the town: shews a sample of corn to a customer, who agrees for a certain quantity, to be delivered at his mill ten miles off: and the goods happen on a market day, merely to pass through the market in the way to the place where they were

 intended

1777. intended to be delivered. If it is really a trick, the defendants must bring an action on the case.

BLAKEY *versus* DINSDALE.

The three other judges concurred.

Per Cur. Judgment for the plaintiff.

Same day.

DUNDASS *versus* Lord WEYMOUTH.

The proper mode of declaring in covenant, is to set out that by indenture, certain premises therein mentioned were demised, without stating them particularly, subject amongst other things to a *proviso*, setting out the substance of the covenant, and the breach.

THIS was an action of covenant on a mortgage deed, in which the declaration set out all the premises, the *habendum*, the proviso, the covenant for payment of the money, and the breach for non-payment. The premises were very numerous, and swelled the declaration to a considerable length. The cause stood in the paper for judgment on demurrer to the declaration, and there was no argument. But Lord *Mansfield* took notice of the great length of the declaration, and said, though he was told this was the usual practice, he thought it a disgrace to the profession and the court.

A gentleman at the bar who had drawn it solemnly averred he took it to be necessary. Mr. *Wallace* and others, conversant in special pleading, said, it was not only unnecessary, but very dangerous, by being liable to variances and formal objections.

The Court were all of opinion, that it is sufficient for the plaintiff to set out in his declaration, that the defendant by indenture had demised certain premises therein mentioned, without stating them particularly, subject amongst other things to such a proviso, setting out the substance of the covenant and the breach.

Lord *Mansfield* desired the bar to take a note of this, and waited till several gentlemen made a memorandum: And gave notice, that the court would animadvert upon any future instance of putting parties to the enormous expence of setting out deeds at length, or superfluous parts of them. *N. B.* In this case, though there was no question, the defendant wanting only a little time, and though the plaintiff had no view to put the defendant to unnecessary charge, the expence of this unnecessary declaration amounted to a large sum.

TYRIE *versus* FLETCHER.

Tuesday, Nov. 18.

Upon a policy "at "and from "such a "a port to "any other "port or 'place 'whatsoever for '12 *months*, 'at 9 *l per 'cent.* warranted 'free from "capture," the risk is entire; and therefore, if once begun, there shall be no return of premium.

THIS was an action on the case, for money had and received to the plaintiff's use; brought by the plaintiff, the *insured* in a policy of insurance, against the defendant, the underwriter, for a return of *part* of the premium.—The cause was tried before Lord *Mansfield* at *Guildhall*, at the sittings after last *Trinity* term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the court upon the question, Whether, under the circumstances of the case, a proportionable part of the premium ought to be returned, or not? If the court should be of opinion, that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered.—It now came before the court upon a rule to shew cause why a nonsuit should not be entered; and the case, as it appeared from the report, was shortly this. "The policy of insurance was "upon the ship *Isabella*, at and from *London* to any port or "place, where or whatsoever, *for twelve months*, from the 19th "of *August* 1776, to the 19th of *August* 1777, both days inclu- "sive, at 9 *l. per cent.* warranted free from captures and seizures "by the *Americans*, and the consequences thereof." In all other respects it was in the common form, against all perils of the sea, &c. The ship sailed from the port of *London*, and was taken by an *American* privateer, about two months afterwards.

Mr. *Dunning* and Mr. *Davenport*, for the plaintiff, shewed cause, and insisted, that a proportionable part of the premium in this case ought to be returned: That 9 *l.* the compensation estimated for the risk of *twelve* months, was much more than adequate to the risk actually run in this case, *viz.* only *two* months. That from the nature of the insurance, both parties must know the risk was divisible; and of course intend, if it ceased before the twelve months, that the whole of the premium should not be retained. That this was the law in other cases, where, upon a suitable compensation for a given risk, the risk had turned out to be different from what was expected. In *Stevenson* versus *Snow*, 3 *Bur.* 1237. the risk ceased before the end of the voyage insured, and it was there held, there should be a return of premium in proportion to the risk that had not been run. It is true, that was a policy upon a *voyage*; but it is as easy, or easier, to apportion the risk in a policy upon time,

1777. as it is, in a policy upon distance. In the case of *Bond* versus *Nutt*, *Trin.* 17 *Geo.* 3. *B. R.* * which was a policy "at and "from *Jamaica* to *London*," the underwriters paid into court a part of the premium, in proportion to that part of the voyage from which they held themselves discharged. This case is not like the case of an insurance upon lives, to which it was compared at the trial; because, that is in the nature of a wager: But this is, in the true spirit and use of an insurance, an indemnity against a loss. That loss, according to the terms of the policy, might accrue later, or earlier, or not at all; but in the case that has happened, namely, a capture by an *American* privateer, the risk of any such loss as that insured against must totally cease. The construction therefore of the policy, under these circumstances, ought to be, that it was an insurance for *twelve* months at the *rate* of *so much per month*; and as the risk in fact, was only run for two months, the premium advanced upon the other ten, ought to be returned.

TYRIE *versus* FLETCHER.

* *Supra*, 601.

Mr. *Wallace* and Mr. *Baldwin contra*, for the defendant, and in support of the rule, contended, that as soon as the ship sailed from the port of *London*, the policy attached for the whole time insured against. That there was no calculation of the premium, at so much *per* month; but it was one entire gross sum of 9 *l. per cent.* stipulated and paid for twelve months. The contract therefore was *entire*, without any intention or thought of division, or apportionment. That the case of *Stevenson* versus *Snow* did not at all apply; for there, the court went upon the ground of its being a policy upon *two distinct* voyages, separately and distinctly in the contemplation of the parties at the time; and the premium calculated accordingly. Of course, if either of the voyages were prevented from taking place, the risk upon it could not attach; and therefore the premium ought to be returned. Upon the principles laid down on the other side, every policy for time might be divided. Suppose an insurance for a month, would the plaintiff have been entitled to restitution for a number of days? It is absurd; and there would be no drawing the line. If there had been a recapture the policy would have revived. The fault of the party, is not the true ground upon which a return of premium is or is not allowed; but it rests upon this; Whether the risk, or the voyage insured, has begun? If it has, there can be no return of premium, 2 *Magens* 267. No. 1,071. There are many cases, where, notwithstanding the fault of the party, a return of premium is al-

 lowed,

lowed. For instance, if a ship is insured at and from such a port to such a port, and the party goes on another voyage, the premium must be returned: Because the risk never commenced. So, if he is to sail with convoy, and stays behind.—But with respect to the present case, it is not distinguishable from an insurance upon a life for a year, with an exception of suicide, where the party destroys himself within a month. No one ever thought of requiring a return of premium in that case, because the *risk* is *entire*. So here, it is one *entire, indivisible* risk; which being once begun, there can be no return of premium. And consequently, the plaintiff is not entitled to recover.

Lord MANSFIELD.—It was very proper to save this case for the opinion of the court, because in all mercantile transactions, certainty is of much more consequence, than which way the point is decided; and more especially so, in the case of policies of insurance; because, if the parties do not chuse to contract according to the established rule, they are at liberty as between themselves to vary it. This case is stript of every authority. There is no case or practice in point; and, therefore, we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable to this question: The first is, That where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned: Because a policy of insurance is a contract of indemnity. The under-writer receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2. Another rule is, that if that risk of the contract of indemnity has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned: and yet, it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies* agreeably to the terms of the policy in this case, and had been taken twenty-four hours after the risk was begun, by an *American* captor, there is not a colour to say, that there should have

been

1777.

TYRIE *versus* FLETCHER.

been a return of premium. So much then, is clear; and indeed, perfectly agreeable to the ground of determination, in the case of *Stevenson* versus *Snow*. For in that case, the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two* insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*: But if the ship did not depart from *Portsmouth*, with convoy (particularly naming the ship appointed to be convoy,) then, there was to be no contract from *Portsmouth* to *Halifax*: why then, the parties have said, "we make a contract from *London* to "*Halifax*, but on a certain contingency it shall only be a con-"tract from *London* to *Portsmouth*." That contingency not happening, reduced it in fact to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction. Mr. *Yates*, who was for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages: and it was the equitable way of considering it; for, though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly upon that ground, but it was the opinion of the whole court. There was a usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such like cases, but they could not say *what* part. The court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom, plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: And there can be no doubt of the reasonableness of the thing.—There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is, an insurance upon a man's life for twelve months. There can be no doubt but the risk there, is constituted by the measure of time, and depends entirely upon it: For the underwriter would demand double the premium for *two* years, that he would take to insure the same life for *one* year only: In such policies there is a general exception against suicide.—If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned.—A case of general practice was put by Mr. *Dunning*, where the words of

the

the policy are, "At and from, provided the ship shall sail on or "before the 1st of *August*:" And Mr. *Wallace* considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so, on the contrary, I think with Mr. *Dunning*, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day: but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination in *Stevenson* versus *Snow*; and that there were *two* parts or contracts of insurance, with distinct conditions. The first is, I insure the ship in port, provided she is lost in port before the 1st of *August*: And 2*dly*, if she is not lost in port, I insure her then during her voyage from the 1st of *August*, till she reaches the port specified in the policy. The loss in port must happen, before the risk upon the voyage could commence: And *vice versâ*, the risk in port must cease, the moment the risk upon the voyage began.—Let us see then what the agreement of the parties is in the present case. They might have insured from two months to two months; or in any less or greater proportion, if they had thought proper so to do; but the fact is, that they have made *no division of time at all*; but the contract entered into is one entire contract from the 19th *August* 1776, to the 19th *August* 1777; which is the same as if it had been expresly said by the *insured*, "If you the underwriter will insure me for "twelve months, I will give you an *entire* sum; but I will not "have any apportionment."—The ship sails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned.—I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

1777. TYRIE *versus* FLETCHER.

ASTON Justice.—This case depends upon the words of the policy: and I am of opinion, it is one entire contract at a certain gross sum of 9 *l. per cent.* for a certain period of time, *viz.* twelve months; and that no division is to be implied. The determination in *Stevenson* versus *Snow*, went expresly upon this consideration; that there were *two distinct* voyages; and no consideration received by the *insured* for the premium upon the second voyage; And there certainly was not; for there never was any point of time, when any risk was run from *Portsmouth*. In *Bond* versus *Nutt*, the losses insured against were distinct, and unconnected with each other, 1*st*. A loss of the ship in port, if

any

1777. TYRIE *versus* FLETCHER.

any should happen there. 2*dly*. A loss in her passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance upon a life, the sum is *lumped*, and the time is *lumped* for the year. So in this case I think the contract is one entire contract; and, therefore, that there ought to be no return of premium.

Mr. Justice *Willes* and Mr. Justice *Ashhurst* were of the same opinion.

Per Cur. Let a nonsuit be entered.

CARLISLE *qui tam versus* TREARS.

If plaintiff declare upon a corrupt contract on the 21st *December*, 1774, giving day of payment to the 23d *December*, 1776; evidence of a contract on the 23d *December*, 1774, for *two* years, is a fatal variance.

UPON shewing cause why the verdict found for the plaintiff in this case, upon the *eleventh* count, should not be vacated, and instead thereof, a verdict entered for the defendant, Lord *Mansfield* reported the case shortly as follows: This was an action upon the statute of usury, 12 *Ann. stat.* 2. *c.* 16. The declaration consisted of a variety of counts, and upon not guilty pleaded, the jury found a verdict for the plaintiff. The single question arises upon the last count, which stated, that upon a corrupt contract made on the 21st *December*, 1774, the defendant received 6 *l.* 8 *s.* upon the loan of for giving day of payment to the 23d *December*, 1776. The only witness who was called, proved the contract to have been made on the 23d *December*, 1774, and he said, he understood it to be for *two* years. I thought this a variance, but reserved it for the opinion of the court.

Mr. *Wallace* for the defendant, and in support of the rule, insisted, that the time of forbearance was as necessary to be precisely stated as the sum.

Mr. *Davenport contra*, for the plaintiff argued, that supposing the contract was made on the 23d *December*, and the forbearance to be for *two* years, it was equally usurious, and therefore, the variance was immaterial.—But, by Lord *Mansfield*, there is no colour for the plaintiff's recovering upon this count. The usurious contract must be proved as laid: whereas, the contract, proved in this case, is totally different from the contract stated in the declaration.

Per Cur. Rule absolute.

REX *versus* RODDAM.

THIS was a rule upon the defendant to shew cause, why he had not obeyed a writ of *habeas corpus*, requiring him to bring up the bodies of two persons *ad testificandum*. The writ was directed to the defendant as commanding officer of a man of war, on board of which, the two persons intended to be brought up, were in the capacity of common sailors, but *not* as *prisoners*.

Mr. *Buller*, who shewed cause, said, a decisive answer to the application was, that the writ was not signed by a judge.

Lord MANSFIELD.—I refused to sign the writ, because there was no affidavit that the men had been served with *subpœnas*, and that they were willing to attend: And without such an affidavit, the writ ought not to go: They can never be brought up as prisoners against their consent. Therefore discharge the rule with costs.

REX *versus* HORNE.

Wednesday, Nov. 19th.

Upon an information against the defendant for a libel, for that *he, &c.* wickedly, maliciously and seditiously did write and publish, *&c.* a certain false, scandalous, and seditious libel "OF AND CONCERNING *his Majesty's government and "the employment of his troops"* according to the tenor and effect following; (setting forth the libel *verbatim.*)—The words "*of and concerning*" are a *sufficient introduction* of the *matter* contained in the libel, and a sufficient *averment* that it was written "*of and concerning the King's government, and the employment of his troops.*"

THIS was an information filed against the defendant, by *Edward Thurlow*, Esq. his Majesty's Attorney General, on behalf of his Majesty, for writing, printing, and publishing two libels.

The first count in the information stated, "That the said "*John Horne*, being a wicked, malicious, seditious, and ill-dis-"posed person, and being greatly disaffected to our said present "Sovereign Lord the King, and to his administration of the go-"vernment of this kingdom, and the dominions thereunto be-"longing, and wickedly, maliciously, and seditiously intending, "devising, and contriving to stir up and excite discontents and "seditions among his Majesty's subjects, and to alienate and "withdraw the affection, fidelity, and allegiance of his said Ma-"jesty's subjects from his said Majesty, and to insinuate and cause "it to be believed, that divers of his Majesty's innocent and de-"serving subjects had been inhumanly murdered by his said Ma-"jesty's troops in the province, colony, or plantation of the *Mas-"sachuset's Bay*, in *New England*, in *America*, belonging to the

"crown

1777.

REX *versus* HORNE.

" crown of *Great Britain*, and unlawfully and wickedly to seduce " and encourage his said Majesty's subjects in the said province, co- " lony or plantation, to resist and oppose his Majesty's government, " on the 8th day of *June*, in the 15th year of the reign, *&c.* " with force and arms at *London* aforesaid, in the parish of *St.* " *Mary le Bow*, in the ward of *Cheap*, wickedly, maliciously, and " seditiously, did write and publish, and cause and procure to be " written and published, a certain false, wicked, malicious, scan- " dalous and seditious libel, *of and concerning his said Majesty's* " *government, and the employment of his troops*, according to the " tenor and effect following:——" *Kings Arms Tavern, Corn-* " *hill, June* 7, 1775. At a special meeting this day of several " members of the Constitutional Society, during an adjournment, " a gentleman proposed, that a subscription should be immediately " entered into, (by such of the members present who might ap- " prove the purpose,) for raising the sum of 100 *l.* to be applied to " the relief of the widows, orphans, and aged parents of our " beloved *American* fellow subjects, who, faithful to the charac- " ter of *Englishmen*, preferring death to slavery, were, for that rea- " son only, inhumanly murdered by the King's (meaning his said " Majesty's) troops, at or *Lexington* and *Concord*, in the province of *Massachuset's* (meaning the said province, colony, or " plantation of the *Massachuset's Bay*, in *New England*, in *Ame-* " *rica*,) on the 19th of last *April*; which sum being immediately " collected, it was thereupon resolved, that Mr. *Horne* (meaning " himself the said *John Horne*) do pay to-morrow into the hands of " Messieurs *Brownes* and *Collison*, on the account of Dr. *Franklin*, " the said sum of 100 *l.* and that Dr. *Franklin* be requested to " apply the same to the abovementioned purpose.—*John Horne*." " (meaning himself the said *John Horne*) in contempt of our said " Lord the King, in open violation of the laws of this kingdom, " to the evil and pernicious example of all others in the like case " offending, and also against the peace of our said present Sove- " reign Lord the King, his crown and dignity."

There were other counts in the information, charging the said *John Horne*, with causing the same libel to be printed in *The London Packet, or New Lloyd's Evening Post*, and *The Morning Chronicle, or London Advertiser.*

The count on the *second* libel was as follows, *viz.* That the said *John Horne* being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising, and contriving as aforesaid, afterwards, to wit, on the 14th day of

July

July in the 15th year aforesaid, with force and arms at *London* aforesaid, in the parish and ward aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, *of and concerning his said Majesty's government, and the employment of his troops*, according to the tenor and effect following: "I (meaning himself the said *John* "*Horne*) think it proper to give the unknown contributor this "notice; that I (again meaning himself the said *John Horne*) did "yesterday pay to Messrs. *Brownes* and *Collison*, on the account of "Dr. *Franklin*, the sum of 50 *l.* and that I (again meaning him-"self the said *John Horne*) will write to Dr. *Franklin*, requesting "him to apply the same to the relief of the widows, orphans, and "aged parents of our beloved *American* fellow subjects, who, "faithful to the character of *Englishmen*, preferring death to slavery, "were (for that reason only) inhumanly murdered by the King's "(meaning his said Majesty's) troops, at or near *Lexington* and "*Concord*, in the province of *Massachuset's* (meaning the said "province, colony, or plantation of the *Massachuset's Bay* in *New* "*England* in *America*) on the 19th of *April* last. *John Horne*." "(again meaning himself the said *John Horne*) in contempt of "our said Lord the King, in open violation of the laws of this "kingdom, to the evil and pernicious example of all others in "the like case offending, and also against the peace of our said "present sovereign Lord the King, his crown, and dignity."

1777. Rex *versus* Horne.

Other counts were added for causing this last libel to be printed in the public newspapers. The defendant pleaded: Not guilty.

The information was tried at the sittings in *London*, after *Trinity* Term, 1777, before the Earl of *Mansfield*, by a special jury, and the defendant found guilty of all the offences charged in the information.—This day Mr. *Horne, in person*, moved the court in *arrest of judgment*, alleging that the information was insufficient, in as much as it did not aver that any rebellion had been in the colony of the *Massachuset's Bay*, or that certain persons, who were denominated the King's troops, had been employed by his Majesty and his government to quell that rebellion, or that any engagement had happened between the King's troops and the rebels, or that any of the rebels had been slain in such engagement by the King's troops, or that the advertisements, or that the charge of murder therein contained, had any relation

to

1777. to such slaughter of the rebels, or to the action of the King's troops.

REX *versus* HORNE.

He argued, that nothing can be intended beyond that which is expressly averred in the record. On the other hand, if by any possible construction or intendment those expressions which are said to be criminal, can receive an *innocent* sense, consistently with what is expressly averred in the record, the consequence is, that no crime is sufficiently alleged. That troops may mean flocks, or companies of strollers, or deserters, and if, in *any supposable* circumstances, the words complained of might have been said *innocently*, there is no crime charged in this record. He cited Mr. Justice *Atkins's* opinion, *State Trials, vol.* 3. 760. as to the insufficiency of the indictment against Lord *Russel*, charging him with a design to seize the guards for the preservation of the King, *without* averring, "*who the King's guards were.*"

Lord MANSFIELD.—Whatever the degree of guilt may be, how strongly soever it may have been proved, or whatever observations may have arisen in this case; yet if the defendant is entitled to a legal advantage from a literal flaw, GOD forbid he should not have the benefit of it. It is most certain, that at the trial, the information was considered to be, for words written "*of and concerning the King's government*, and *his* employment "of his troops;" that is, the employment of the troops by government. Upon that ground, the defendant called a witness, (Mr. *Gould*,) whom the Attorney General rose to object to. He was called to prove the contents of an affidavit made by him, and published in the papers. I told the defendant he could not be called to prove the contents; but if he only meant to prove there was such an affidavit published, and by that, to explain the subject matter to which the libel related, it might be read. If it was the employment of the troops, under proper authority, *that* came within the charge in the information. Had it been a lawless fray it would not; and so I believe I said at the trial. It might have been a libel of the individuals; but it would not have been *this* libel; a libel of the *King's troops* employed by *him*. Now at first, and at present, it seems to me, that, "*of and concerning the King's government and the employment of his troops*" pins it down. But I doubt a little whether there may not be some weight in the objection; that is, whether in the form of drawing the information there should not have been *innuendos*. In common reason and understanding it is charged; but whether technically charged or not, I do not know; and

there-

therefore, as to this point, without prejudice, we will take some time to consider of it; to see whether *precedents* can be found, which require a technical scrupulousness, over and above that certainty which is sufficient to every reader; and we will go on with the rest, *de bene esse*, as we could not pronounce judgment upon it now. We will consider of it till the defendant comes up again; and if we find sufficient to satisfy us to over-rule the objection, then we will give judgment upon the whole of the case at the same time.—His lordship then reported the evidence as follows:

Thomas Wilson proved the advertisements in question, the manuscripts, to be the hand of *Horne*. *Henry Sampson Woodfall*, who published the advertisements, swore that the defendant gave him a paper on the 7th of *June*, to publish in his own and to send to the other papers; and that the defendant paid the fees: then he produced two advertisements to be published. The defendant cross-examined him, and he assented to the question of the cross-examination, by saying, "By your desire I inserted these "advertisements; and published them as your act and deed: You "never desired to be screened; but you desired to be given up: "You said, they should not want full evidence."—*William Woodfall* proved likewise a paper given *him* by the defendant to be inserted in the *London Packet*, and *Morning Chronicle*, which were the advertisements in the record. Therefore, upon the fact of printing and publishing there is no doubt at all.

The defendant called a witness to prove that really and in truth there was a subscription, and that the money was actually raised; he likewise called *William Lacy*, who proved that 100*l.* was paid to him, and by him remitted to Dr. *Franklin*. Then the defendant called *Thoroton Gould*, who said, that at *Lexington*, on the 19th of *April* 1775, he was a subaltern officer, that he was ordered there by the Adjutant of General *Gage*, the commander in chief of his Majesty's troops, and governor of the province; and he, together with the other troops, set out, and between two and three in the morning he was taken prisoner; that he heard the provincials charge our troops. He said, "we found them armed; we supposed they were marching to at-"tack us, from a continual firing of alarm cannon, early in the "morning, as soon as we began to march: notice or alarm guns "are to raise the country." Upon this evidence the jury found the defendant *guilty*.

Lord MANSFIELD then asked the Attorney-General, if he had any thing to say; who answered, he apprehended it belonged to

1777. REX versus HORNE.

the defendant to state what he could to the court in his extenuation.

Mr. *Horne* said, he should state nothing in extenuation, till the court had told him there was a crime. His objection was, that no crime was charged in the information, and, therefore, it was unnecessary for him to say any thing till the court had disposed of that objection.—The matter was accordingly adjourned till *Monday* the 24th instant in this term; when Mr. *Horne* appearing again in court, Lord *Mansfield* delivered the opinion of the court, upon the objections taken in arrest of judgment, to the following effect:

Lord MANSFIELD.—In reading my notes the other day in the case of the *King* and *Horne*, I overlooked the reference to a written piece of evidence given by the defendant at the trial; and I am told I did not state it: Therefore I will state it now.

He produced to captain *Gould* the *Public Advertiser* of the 31st of *May* 1775, in which was an advertisement purporting to be the copy of an affidavit, made by captain *Gould*, while he was a prisoner, in the custody of the rebels, at *Bedford*; and he asked him, Whether the contents were truly printed? I told the defendant, if he meant to prove the facts to be true as above, it could not be done by affidavit, the person himself being present; and even if he was absent, they could not be proved by affidavit; but if he meant to shew, that at that time there existed a public account in the newspapers, which might be of use to restrain or qualify the meaning of the paper in question upon the information, he might do so. *He said, he desired it to be read in that light*; and in that light it was read, and is as follows:

"I *Edward Thorston Gould*, of his Majesty's own regiment "of foot, being of lawful age, do testify and declare, that on "the evening of the 18th instant, under the orders of *General* "*Gage*, I embarked with the light infantry and grenadiers of "the line, commanded by colonel *Smith*, and landed on the "marshes of *Cambridge*, from whence we proceeded to *Lex*-"*ington*: On our arrival at that place we saw a body of pro-"vincial troops armed, to the number of about 60 or 70 men. "On our approach they dispersed, and soon after, firing began; "but which party fired first I cannot exactly say, as our troops "rushed on shouting and huzzaing previous to the firing, which "was continued by our troops so long as any of the provincials "were to be seen: From thence we marched to *Concord*. On

"a hill

" a hill near the entrance of the town, we saw another body of " the provincials assembled. The light infantry companies were " ordered up the hill to disperse them; on our approach they " retreated towards *Concord*; the grenadiers continued the road " under the hill towards the town; six companies of light infan- " try were ordered down to take possession of the bridge, " which the provincials retreated over; the company I com- " manded was one; three companies of the above detachment " went forward about two miles; in the mean time the provincial " troops returned to the number of about three or four hundred; " we drew up on the *Concord* side of the bridge; the provincials " came down upon us, upon which we engaged and gave the " first fire. This was the first engagement after the one at " *Lexington*; a continued fire from both parties lasted through " the whole day; I myself was wounded at the attack of the " bridge, and am now treated with the greatest humanity, " and taken all possible care of by the provincials of *Meel-* " *ford*. Signed. *Edward Thoroton Gould*."

This, with what I have before reported, is the whole of the evidence. There was a motion made the other day in arrest of judgment, and many objections taken to shew, that the charge, as it stands upon this record, is insufficient in law to support any judgment. That there was no averment as to the state of the *Massachuset's* colony at that time; either that there were *riots*, insurrections, or a rebellion: No averment that the King had sent any troops; no averment that there was any skirmish or engagement; or the nature of it; how it began, or how it went on, or ended; and lastly, that it was not averred, "*that the* " *employment of the troops was by the King's authority*." The only objection, which had any colour in it, was that which I mentioned last: I thought then, and said, that the averment of the words being written " of and concerning the King's government," was an answer; but no precedent was cited or alluded to on either side. I fancy the Attorney General was surprised with the objection; but there was no precedent cited. I could not say upon my memory, whether *precedents* might not *require some technical form* of expression, as to that medium, through which words are averred to be written "*of the King's government*;" and if any flaw had happened, formally, technically, or verbally, though not at all founded in the sense or reason of the thing, I should in this case have been of the same opinion I was, in the case of an outlawry; that the defendant ought to have the be-

 nefit

1777. Rex *versus* Horne.

nefit of it: And therefore I desired we might think of it for some time, that precedents might be searched, and the books looked into. We have duly weighed every thing: Precedents have been looked into; we have fully considered the information, all the objections that were mentioned, and all the objections we ourselves could think of; and we are all clearly of opinion, *without any doubt*, that the information is sufficient. An indictment or information must charge what in law constitutes the crime, with such certainty as must be proved: But that certainty may arise from a *necessary* inference; in the manner settled in the case of the *King* and *Lawley* in *Strange* *. Plain words in a libel speak for themselves; if they are doubtful, their meaning must be ascertained by an *innuendo*. Here the words are plain; and want no *innuendo*: They are averred to be written "of and concerning the King's "government and the employment of his troops." The obvious meaning is, that the *employment* of the King's troops must be under his authority: and necessarily so when the words preceding are "of and concerning the King's government." This must now be taken to be true; because the verdict finds it. Had the question arisen upon a demurrer, it must equally have been taken to be true.—The *gist of every charge of every libel consists in the person or matter of and concerning whom* or *which* the words are averred to be said or written. In the *King* versus *Alderton* † the information was held bad, because it was *not* laid in the information, that the libel was "of and concerning the "justices of *Suffolk*." Where the words are averred to be "of "*and concerning the King's government*" or "of *the government* "*of the kingdom*," or "*of the government of the navy*," as to any thing further of which they are also written, or any *particular circumstances* mentioned in the libel, through the medium of which it calumniates the King's government, *they* need not be particularly noticed in the *introductory* part of the information; nor is any technical form of expression necessary. It cannot be; because there may be cases where the King's government might be calumniated through an imputation upon the gross licentiousness of his troops. The only question to be tried is, "Whether the words laid, are written of the King's govern-"ment?" It may vary the *degree* of mischief, malice or guilt; but it is totally immaterial as to the *constitution* of the crime upon the record, whether the words refer to something that has existed, and misrepresent such existent facts, or are an entire *fiction*. Had *Lexington* been left out; or had any other place, where

* 2 Str. 904.

† Pasch. 29. Geo. 2. B.R.

where there had been no ſkirmiſh, or engagement, been mentioned as the ſcene inſtead of *Lexington*; it would without any *innuendo* have been equally a libel, if meant to impute the ſame kind of miſconduct to the King's troops acting under his authority. It is the duty of the jury to conſtrue plain words and clear alluſions to matters of univerſal notoriety, according to their obvious meaning, and as every body elſe who reads muſt underſtand them. But the defendant may give evidence to ſhew they were uſed upon the occaſion in queſtion, in a different or in a qualified ſenſe. If no ſuch evidence is given, the natural interpretation of the words, and the obvious meaning to every man's underſtanding, muſt prevail. Before this trial, *five* different juries had found theſe words, from their *neceſſary meaning*, to be "*of and concerning the King's government.*" In this caſe the defendant gave evidence: But the evidence he gave plainly *demonſtrated* that the words related to troops *acting under the King's authority*; and conſequently, that the libel was "concerning the *King's government*;" for the military department is one branch of government. I am the more confirmed that upon this occaſion there is *little doubt of any real flaw* in the information, becauſe, in thoſe five trials I allude to, a *great variety of counſel of learning, eminence, and ability, were employed*, who were called upon to pry, with all the acuteneſs they had, into the information, to diſcover a flaw in it: But there were *five* judgments paſſed upon the ſeveral defendants: And no counſel ſaw or imagined there was any ſuch objection as the preſent: Upon the whole, we are all ſatisfied that the information is ſufficient.

1777.

Rex *verſus* Horne.

Mr. Attorney General then addreſſed the court, and Mr. *Horne* was heard in anſwer *; after which, Mr. Juſtice *Aſton* pronounced the judgment of the court as follows:

Aston Juſtice.—*John Horne*, Clerk, you ſtand convicted upon an information filed againſt you by his Majeſty's Attorney General, of writing and publiſhing, and cauſing to be printed and publiſhed, a falſe, wicked, and ſeditious libel of and concerning his Majeſty's government, and the employment of his troops. The libel has been openly read in court from the record; and, upon the report of his lordſhip who tried this information, it appears that, upon your own croſs-examination of one of the witneſſes, you gloried in the publication of it; that you avowed you did not deſire to be ſcreened; and avowed your-

* See the ſpeeches at large in vol. xi. *State Trials*, new edition, 291, & *ſeq.*

1777. Rex *versus* Hoane.

self the author of it. Since that indeed, in this court, you attempted to gloss over parts of this libel, and to confine its tendency to a possible *private* charge upon the King's troops, and not concerning his Majesty's government; to treat the word "*troops*" as indeterminate in it's signification, and not to carry with it the construction which the information avers, and which the jury have found, of its "concerning the King's government "and the employment of those troops by *his authority*." You have said, very truly, that evidence is not to supply any defect in an information. There is no defect in the information; the information sets forth the libel at large; and the information charges that libel to be "of and concerning his Majesty's government," as I before mentioned. Upon that, the court has now decided agreeable to the finding of the jury; and no man can really mistake the malicious *meaning* and *insinuation* of it. It is a libel which contains a most audacious insult upon his Majesty's administration and government, and the conduct of his loyal troops employed in *America*. It treats those *disaffected* and *traiterous* persons, who have been *in arms and in open rebellion* against his Majesty, as faithful subjects—faithful to the character of *Englishmen*; and it falsely and seditiously asserts, that, "for that "reason only, they were inhumanly murdered by his Majesty's "troops at *Lexington* and *Concord*." By the same libel, subscriptions too are proposed and promoted for the families of those very *rebels* who *fell in that cause*, traiterously fighting against the troops of their lawful sovereign. This is the light in which this libel must appear to every man of a sound and impartial understanding; this is the plain and unartificial sense of it. The contents of this libel have been too effectually scattered and dispersed by your means, as charged in the several counts of the information, and they have been inserted in divers and different newspapers; the contents are too well known, and I trust abhorred, to need any repetition from me, for the sake of observing farther upon their malice, sedition, and falsehood. The court have considered of the punishment fit to be inflicted upon you for this offence: And the sentence of the court is—That you do pay a fine to the King of 200 *l.*; that you be imprisoned for the space of twelve months, and until that fine be paid; and that upon the determination of your imprisonment, you do find sureties for your good behaviour for three years, yourself in 400 *l.* and two sureties in 200 *l.* each.

After-

Afterwards the defendant brought a writ of error in the House of Lords, which was argued by the Attorney and Solicitor General for the crown, and by Mr. *Dunning* and Mr. *Lee* for the defendant. 1777. REX *versus* HORNE.

After counsel on both sides had been fully heard, the following question was put to the Judges: "Whether the writing "contained in the information, was, in point of law, sufficiently charged to be a libel upon his Majesty's government?"

Lord Chief Justice *De Grey* delivered the unanimous opinion of all the Judges in the affirmative, and gave his reasons, as follow: *Monday, May 11th. 1778.*

My Lords, I have conferred with the Lord Chief Baron, and the rest of my brethren the Judges, upon the question which your Lordships have propounded to us; and I am deputed by them to deliver their unanimous opinion to your Lordships upon it.

The question is, "Whether the writing described in the information, is *sufficiently charged* to make it a libel upon his Majesty's government?"

By the words "*sufficiently charged*" I understand to be meant, Whether it is charged with sufficient certainty? But, though the law requires certainty, we have no precise idea of the signification of the word; which is as indefinite in itself as any word that can be used. Lord *Coke*, speaking of it, represents it thus: * "There are *three* kinds of certainties: Certainty "to a certain intent in general; certainty to a common intent; "and certainty to a certain intent in every particular." This *last* is rejected in all cases, as partaking of too much subtlety. The *second* is sufficient in *defence*; the *first* is required in a *charge* or accusation.

* Co. Litt. 303. a & 5 Co. 121.

Perhaps this account of it does not convey a much clearer idea; but I apprehend it will become intelligible, by considering the grounds of the distinctions taken in the present case, upon the certainty required in a charge.

The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of "guilty" or "not guilty" upon the premises delivered to them; and that the court may see such a definite crime, that they may apply the punishment which the law prescribes.

1777. This I take to be what is meant by the different degrees of certainty mentioned in the books: And it consists of two parts; the *matter* to be charged; and the *manner* of charging it.

REX *versus* HORNE.

As to the *matter* to be charged, whatever circumstances are necessary to constitute the crime imputed, must be set out; and all beyond are surplusage. And therefore, in the instance of the prosecution for perjury which has been cited*, it was necessary to set out the oath, as an oath taken in a judicial proceeding and before proper persons, in order to see whether it was an oath which the court had jurisdiction to administer. In the prosecution of a constable for not serving the office†, it is necessary to set out the mode of his election; because, if he is not legally elected, he cannot be guilty of a crime in not serving the office. Where the circumstances go to constitute a crime, they must be set out:—Where the crime is a crime independently of such circumstances, they may aggravate, but do not contribute to make the offence.

* Cr. Eliz. 137.

† 5 Mod. 96.

To apply these principles to the case of a libel: It may happen, that a writing may be so expressed, and in such clear and unambiguous words, as that it may amount of itself to a libel. In such a case, the court wants no circumstances to make it clearer than it is of itself: And therefore, all foreign circumstances introduced upon the record would be only matter of supererogation. But, if the terms of the writing are general, or ironical, or spoken by way of allusion or reference, although every man who reads such a writing may put the same construction upon it, it is by understanding something not expressed in direct words; and it being a matter of crime, and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just: And the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appears upon the record; which it cannot do without an averment.

Thus much is sufficient to be said, in regard to the *matter* that is necessary to be averred.

Secondly, as to the *manner* of making the averment: There are cases, where a *direct* and positive averment is necessary to be made in *specific* terms; as, where the law has affixed and appropriated technical terms to describe a crime; as in murder, burglary, and others. It is likewise true, that in all cases, those *facts* which are *descriptive* of the *crime*, must be introduced

upon

upon the record by *averments*, in opposition to argument and *inference*. In the case of a libel which does not in itself contain the crime, without some extrinsic aid, it is necessary that it should be put upon the record, by way of *introduction*, if it is *new* matter; or by way of *innuendo*, if it is only matter of *explanation*. For an *innuendo* means nothing more than the words, "*id est*," *scilicet*," or "*meaning*," or "*aforesaid*," as, explanatory of a subject matter sufficiently expressed before; as, such a one, *meaning* the defendant, or such a subject, *meaning* the subject in question. But as an *innuendo* is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning; unless something is put upon the record for it to explain. As in an action upon the case against a man for saying of another, "He has burnt my barn*," the plaintiff cannot there, by way of *innuendo*, say, *meaning* "his barn *full of corn*;" because, that is *not* an *explanation* of what was said before, but an *addition* to it. But if in the introduction it had been averred, that the defendant had a barn *full of corn*, and that in a discourse about that barn, the defendant had spoken the words charged in the libel of the plaintiff; an *innuendo* of its being the barn full of corn would have been good: For by coupling the innuendo in the libel with the introductory averment, "his barn full of corn," it would have made it compleat.

1777.

Rex *versus* Horne.

* 4 Co *Barham's* case.

And I conceive, that this kind of *extrinsic* matter may be introduced upon the record, either by *direct averment*, or by *recitals*, or by *general inference*; and that such introductory matters and explanatory *innuendos* so made to appear upon the record, do all amount to sufficient averments.

An *innuendo* is an averment, that *such a one*, means such a *particular person*; or, that such a thing, means such a particular thing: And, when coupled with the introductory matter, it is an averment of the whole connected proposition, by which the cognizance of the charge will be submitted to the jury, and the crime appear to the court.

The libel in the present case says, "That the subscription "proposed to be entered into, was for the relief of the widows, "orphans, and aged parents of our beloved *American* subjects; "who faithful to the character of *Englishmen*, and preferring "death to slavery, were for that reason only inhumanly mur- "dered by the King's troops." It is not necessary to consider, whether this libel comes within the description of a libel, which

constitutes

1777. constitutes a crime of itself, without any assistance of other circumstances; or what our opinions upon that question might be; because, we are all of opinion, that there is sufficient matter expressed with sufficient certainty, to constitute the crime.

REX *versus* HORNE.

But, two questions have been made upon the introductory part of this information: First, Whether, the *interior* subsequent matter, being introduced by the words, "Of and concerning "his Majesty's government, and the employment of his troops," these words amount to a sufficient averment to put it legally upon the record? And secondly, Whether, admitting it to be legally put upon the record, the sense of it must be understood to be a libel upon his Majesty's government?

And first, "Whether it is legally put upon the record in "point of form?"—It is put upon the record by these words:—"That the defendant wrote and published such a libel, *of and* "*concerning* his Majesty's *government* and the *employment of his* "*troops.*" This is an averment; for the fact is, that "He "wrote and published the libel;" and the circumstance connected with that fact, and which therefore makes a part of it is, that "He wrote and published the paper or libel, *of and con-* "*cerning* his Majesty's *government* and the *employment of his* "*troops.*" If the jury, upon the defence set up, had found that the libel was not published relative to the King's government, or the employment of his troops; the information was not proved: for it contains an *entire* proposition. And if it had appeared, that the paper related to a *voluntary* act of the troops only, and not to an employment of them by government, the information would have been false: Because the prosecutor would have failed in the proof of the proposition, that it was written, "*Of and concerning the King's government and the em-* "*ployment of his troops.*"

This is no new doctrine: The cases cited at the bar shew it. In *Tuchin*'s case* one part of the libel was this:—"The mis- "managements of the navy have been a greater tax upon the "merchants, than the duties raised by parliament." It might have been said there, *What navy? Whose navy?* Was it the navy of *England?* or did it mean only the merchant ships? The information charged, that the defendant had written a scandalous and seditious libel; in which the information stated in the *introductory* part, that "*Of and concerning the royal navy* of this "kingdom and the government of the said navy, it is written so

* State Trials, vol. 5. 590.

"and

"and so." When the information came, in stating the libel, to the word "*navy*," by an *innuendo*, it explains it thus: "*meaning*, the *royal navy* of this kingdom;" which, being coupled with the averment in the introductory part of it, made the sense and the charge compleat. Again, in another part of the same information for another libel, one part of the libel was thus: "There is another plot against you:" and afterwards, "it is a plot preparatory to your trial." What trial? The introductory part of the information charged, that this libel was written, "*Of and concerning the defendant*, and a prosecution "to be had against him for divers seditious libels by him, be-"fore that time, composed and published." The information afterwards explains "*you*" thus; meaning "the defendant." *This, connected* with the averment in the introductory part, was a sufficient explanation of the charge. The defendant was found guilty of the several libels in the information. He moved in arrest of judgment; but *not* upon the ground of the *insufficiency* of the averments; for it was sufficiently understood, that, "Of "and concerning the royal navy, &c." was good without any other additional averments. In the case of *Rex* versus *Matthews**, which was an indictment upon stat. 6 *Ann. c.* 7. the words of the libel were these; "From the solemnity of the *Chevalier's birth*, "and if hereditary right be any recommendation, he has that to "plead in his favour." It was there said, *What Chevalier?* Who was he? What recommendation? And to what thing?—In the introductory part, the information charged the libel to have been written, "Of and concerning the Pretender," and "Of and concerning his right to the crown of *Great Britain*." And it was held, that the *innuendos* in the body of the libel, explaining the words "*Chevalier*, &c." to mean the *Pretender* and his *hereditary right* to the *crown* of *Great Britain*, when connected with the averments in the introductory part, of its being written "Of and concerning the Pretender and his right "to the crown of *Great Britain*," were a sufficient explanation to make good the charge.

In the case of *Rex* versus *Alderton*†, the libel there was an advertisement, reciting certain orders made for collecting money on account of the distemper amongst the horned cattle, advertised by the clerk of the peace for the county of *Suffolk*; and it charged, that by these orders the money collected had been improperly applied.—The information charged this to be a libel on the justices of *Suffolk*. In the *body* of the libel, it was *not* said,

1777

REX *versus* HORNE.

* *State Trials, vol.* 9. *p.* 682. *et. seq.*

† *Sayer's Reports* 280.

1777. Rex *versus* Horne.

said, "*by order of the justices*," nor did the information in the *introductory* part say, that it was a libel "*of and concerning* the "justices of *Suffolk*." But when the information came to state any of the orders in the advertisement, it added this *innuendo*; meaning "An order of the justices of peace for the county of "*Suffolk*." But these *innuendos* could not supply the want of an averment in the introductory part, of its being written of and concerning the justices; because they were not explanatory of, but in addition to, the former matter; and the court were of opinion, that the information having omitted the words, "*Of* "*and concerning the justices*", in the introductory part, such omission was fatal: And judgment was accordingly arrested.

From these cases it is clear, that the words "*Of and concern*-"*ing*" are a sufficient introduction of the *new* matter. And therefore in the present case it is, in point of form, a sufficient averment upon the record, that the paper was written "Of and "concerning the King's government."

But *secondly*, it has been argued upon the further charge respecting the troops, that it does not import that these troops were so employed by act of government. And therefore, though it should be held to have been written, "*Of and concerning the* "*King's government*," yet it does *not* appear to be so, *relative to the act of the troops*. It has been further argued, that in giving their opinion upon this point, "The judges can take no know-"ledge of any thing that is said or written, but what they can "collect from the record;" and likewise, "That every accu-"sation taken from the record must be plain and clear; and is "not to be strained by any forced meaning or construction." But, as the crime of a libel consists in conveying and impressing injurious reflections upon the minds of the subject; if the writing is so understood, by all who read it, the *injury is done* by the publication of these injurious reflections, *before* the matter comes to the jury and to the court. And if courts of justice were bound by law to study for any one possible or supposable case or sense, in which the words used might be innocent, such a singularity of understanding might screen an offender from punishment; but it could not recall the words, or remedy the injury. It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and to defend himself by another. Such a doctrine would indeed be pregnant with the *nimia subtilitas*, which my Lord *Coke* so justly reprobates.

The

The true rule to go by is laid down by my Lord *King* in the case of *Rex* versus *Matthews* *, which is this: "*That the court "and jury must understand the record as the rest of mankind do.*" 1777.

REX versus HORNE.

This being the rule, and the accusation such as I have before stated, it remains to be seen only, what the words in the present case are. They are these, "That the defendant, of and con-"cerning the *King's government and the employment of his troops,*" said "that innocent subjects had been inhumanly murdered by "the King's troops only for preferring death to slavery." Do these words import in their natural and obvious sense, that the King's troops were employed by the act of government, inhumanly to murder the King's innocent subjects?——There can be no doubt but that the King's government comprehends all the executive power of the state both civil and military. That he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the subject of the writing in the present case was, "The "troops, and the *King's troops*, and the business they had done."

* State Trials, vol. 9. 710.

It has been truly said, that the King's troops may, like other men, act as individuals: But they can be *employed as troops* by the act of *government only*. If the averment therefore amounts to this, that, in the discourse which was held, the words were said "*of and concerning the King's government;*" the natural import of them, without any forced or strained meaning, appears to us to be this; I am speaking of the King's administration of his government relative to his troops, and I say, "that our "fellow subjects, faithful to the character of *Englishmen*, and pre-"ferring death to slavery, were for that reason only inhumanly "murdered by the King's order; or the orders of his officers." The motive imputed tends to aggravate the inhumanity of the act, and consequently, of the imputation itself: Because it arraigns the government of a breach of public trust, in employing the means of the defence of the subject, in the destruction of the lives of those who are faithful and innocent.

As to any other circumstances not stated in the information; if those which are stated, do of themselves constitute an offence, the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred by the record.

Upon

1777. Rex *versus* Horne.

Upon the whole of the case, therefore, we are unanimously of opinion, that the record contains "All facts and circumstances "necessary to warrant the conclusion of the jury. And that it "likewise contains, all facts and circumstances necessary for "the information of the court to give their judgment upon the "occasion."

Whereupon it was ordered and adjudged, that the judgment, given in the court of *King's Bench* for the King, be *affirmed*, and the record remitted, *&c.*

Friday, Nov. 21st.

Doe *ex dim.* Atkyns, *versus* Horde *et al.*

Lord *Mansfield* was absent, having given his opinion in the year 1757.

In ejectment for lands in *Gloucestershire*, upon not guilty pleaded, the jury found a special verdict stating in substance as follows:

That Sir *Robert Atkyns*, the elder, was, on the 8th of *June* 1699, seised in fee of the premises in question, and being so seised, on the 12th of *June* 1699, made and executed three several indentures: By one of which (called the *lesser deed*) dated the 12th of *June* 1699, made between Sir *Edward Atkyns*, Sir *Robert Atkyns* (son of Sir *Edward Atkyns*,) and Dame *Mary* his wife, of the one part, and Sir *Edward Carteret* and *John Lowe* gent. of the other part; *it was witnessed* that in consideration of Dame *Mary* releasing a *former* jointure and of a *new provision* to be made for her, Sir *Robert* covenanted, that he, Sir *Edward*, and Dame *Mary* would, before the end of *Michaelmas* Term then next ensuing, *levy a fine* of the premises, to the use of Sir *Robert* for life, remainder to the use of Dame *Mary* for life for her jointure, remainder to Sir *Robert Atkyns*, son of Sir *Robert Atkyns* in tail male, remainder to the right heirs of Sir *Robert Atkyns* the father for ever.

The other two deeds were a lease and release, dated the 11th and 12th of *June* 1699, respectively. By the release (called the *greater* deed) made between Sir *E. Atkyns*, Sir *R. Atkyns* the father, and Dame *Mary* his wife, *Philip Sheppard*, Esq; Sir *Clement Farnham*, and *Edward Atkyns*, of the *first part*; Sir *George Carteret*, Sir *Edward Carteret*, *John Lowe*, Lord *Hinchinbrooke*, Sir *Philip Carteret*, and *Edward Swift*, Esq; of the *second part*; Sir *Robert Atkyns* the son, and *Lovis Carteret*, daughter of Sir *George Carteret*, of the *third part*; *it was witnessed*, that in consideration of a marriage thentofore had between Sir *Robert Atkyns* the father

ther and Dame *Mary* his wife, and also of a marriage shortly to be had between Sir *Robert Atkyns*, the son, and the said *Lovis Carteret*, and in consideration of 6,500 *l.* the marriage portion of the said *Lovis Carteret*; and for a provision for Dame *Mary*, the wife of Sir *Robert Atkyns*, the father, in the nature of a jointure, and also for the jointure of the said *Lovis*, Sir *Edward Atkyns*, and Sir *Robert*, the father, *released* the premises in question to Sir *Edward Carteret* and *John Lowe*, to the *uses* of the *lesser deed;* with a proviso, that Sir *Robert Atkyns* the father, Sir *Robert Atkyns*, the son, and *Lovis Carteret* respectively, when in possession of the freehold, might make leases for *three lives* or 21 years, reserving the usual rents; with a further proviso, that Sir *Robert Atkyns*, the father might appoint the manor of *Lower Swell*, *Upper Swell*, and *Stow in the Would*, as a jointure for any *future wife*; with a like power to Sir *Robert*, the son, in respect of the lands settled in jointure upon *Lovis Carteret:* And Sir *Robert* the father, covenanted to levy a fine before the end of the next *Michaelmas* Term to the uses before mentioned.—That in *Trinity* Term 1669, a fine was levied of the premises in question.—That on the 6th of *July* 1669, Sir *Robert* the son married *Lovis Carteret*.—That Dame *Mary died* on the 2d *March* 1680. That afterwards Sir *Robert Atkyns* the father, on the 26th *April* 1681, in consideration of a marriage then intended to be had between him and Mrs. *Ann Dacres*, by indenture of that date, made between himself of the one part, and Sir *Robert Dacres*, *John Dacres*, and *Ann Dacres* of the other part, *assigned* the premises in question *in pursuance of his power* to *Ann Dacres* for life for her jointure; and married her on the 28th of *April* 1681.—That by indenture of the 27th *April* 1681, between *Ann Dacres* of the first part, Sir *Robert Atkyns*, the father, of the second part, and Sir *Edward Atkyns*, reciting the indenture of 26th *April* 1681, and the assignment of the premises therein mentioned, but that *nevertheless it was agreed that only part of the said premises was* to be settled on the said *Ann* for her jointure, and the other part was to be re-conveyed, it was *witnessed* and declared, that the said other part should be, and was re-conveyed to such uses as Sir *Robert Atkyns* should appoint.—On the 27th of *May* 1708, Sir *Robert Atkyns* the father made his will, and thereby devised the reversion of the premises, after the estate tail created by the deed of the 12th of *June* 1669, to *John Tracy* (taking the name of *Atkyns*) in tail, and if he died without issue then to *Ferdinando Tracy* the next younger son of

John

1777. DOE *versus* HORDE.

John Tracy in tail, and so on to other younger sons, with an ultimate reversion to *Richard Atkyns*, the elder son of Sir *Edward Atkyns*: and on the 9th of *February* 1709, *died* seised of the premises in question; whereupon Dame *Ann*, his widow, *entered* on the same, claiming them for her jointure, and was in *possession* thereof.—That by indenture 18th *May* 1710, Sir *Richard Atkyns* assigned the several terms in the deed of the 12th *June* 1699, to *Joseph Walker*, in trust for Sir *Robert Atkyns* the son and the heirs male of his body by Dame *Lovis* his wife.—That Dame *Ann* being in possession of the premises, in *Trinity* Term, 9 *Ann.* 1710, an ejectment was brought against her on the demises of Sir *Robert Atkyns*, the son, and *Joseph Walker*, when a general verdict was found for the plaintiff, and judgment entered up for *Philips*. That Sir *Robert*, the son, in pursuance of the said judgment, *entered into and was in possession* of the premises.—That *Philips*, on the 1st *January* 1710, surrendered the two terms mentioned in the declaration in ejectment to be demised to him, to Sir *Robert Atkyns*, the son, *then in possession*.—That on the 17th *January* 1710, Sir *Robert Atkyns*, the son, being *so in possession*, and *during the life-time of Dame Ann* the widow, made a *feoffment* of the premises to *James Earle* in fee, which feoffment was declared to be, for *docking*, *barring*, *and destroying* ALL ESTATES TAIL, uses, reversions and remainders in the premises; and for vesting the *fee* in Sir *Robert*, the son; *to hold* to *Earle*, to the *intent* and *purpose* that he might become perfect tenant of the freehold in order to suffer a recovery: The use of the said recovery to be to Sir *R. A.*, the son, in fee—That *livery of seisin* was, on the 20th *January* 1710, given to *Earle*, as appears by indorsement on the indenture of 17th *January* 1710. In *Hilary* Term, 9th *Ann.* 1710, a recovery was accordingly suffered, Sir *R. A.*, the son, and *Lovis* his wife being vouchees.—That on the 9th of *November* 1711, Sir *R. A.*, the son, died without issue.—That in *Hilary* Term, 10 *Ann.* an ejectment was brought against *Robert Atkyns*, Esq; heir at law of Sir *R. A.*, the father, and of Sir *R. A.* the son, on the several demises of Dame *Ann* and *Thomas Dacres*; and in *Easter* Term 1712, a general verdict was given for the plaintiff on both demises; and judgment entered up. That immediately after, Dame *Ann* entered upon the premises, and continued in possession thereof till 9th *October* 1712, when she died.—That *Robert Atkyns*, Esq; then entered, and was possessed till the 16th of *March* 1753, when he died without issue male, leaving

Ann

Ann the wife of *Thomas Horde*, and *Elizabeth* the wife of *Edmund Chamberlayne*; his only children and co-heirs at law; having in his life-time by leafe and releafe of 30th and 31ft *October*, 1713, fettled the premifes upon himfelf during the joint-lives of himfelf and *Elizabeth* his wife, with remainder to his firft and every other fon in tail male; with remainder to all and every his daughter and daughters in tail male, reverfion in fee to himfelf.—That *Elizabeth*, the wife of the faid *Robert Atkyns*, died on the 8th of *October*, 1739. That in *Eafter* Term, 2 *Geo.* 2. 1729, *Edmund Chamberlayne* and *Elizabeth* his wife levied a fine of a moiety of the premifes in queftion: And in *Eafter* Term, 24 *Geo.* 2. 1752, *Thomas Horde* and his wife levied a fine of the other moiety.—That *Ferdinando Tracy*, the third fon of *John Tracy* of *Stanway*, died on the 3d of *May*, 1729, under age, and without iffue male. *William*, the 6th fon, died 15th *May*, 1729, without iffue male. *Anthony*, the fourth fon, died on the 29th of *May*, 1767. That *Robert*, the eldeft fon died on the 28th of *September* 1767, without iffue male, in the life-time of *John Tracy*, the fecond fon, whereby the faid *John* became heir to his father. That on the 24th of *June*, 1770, *Thomas*, the fifth fon died without iffue male, he being at the death of *Robert*, the only younger fon of his father. That on the 23d of *July*, 1773, *John* died without iffue male. That *Richard Atkyns*, nephew of Sir *Robert Atkyns* the elder, and devifee under his will, died in *December*, 1717, leaving *Edward Kinfey Atkyns* his heir at law, who died on the 4th of *July*, 1743, leaving *Edward Atkyns* his heir at law, who died on the 22d of *February* 1765, leaving *Edward Atkyns*, the leffor of the plaintiff, his heir at law. The jury then find that *Edward Atkyns*, the leffor of the plaintiff, after the death of *Thomas*, the fifth fon, entered on the premifes in the 2d count, and was feifed; and being fo feifed, made the demife to the plaintiff of the 2d of *July*, 1770. They then find his entry on the premifes in the fourth count, on the 11th of *April*, 1774, after the death of *John Atkyns*, the fecond fon; and the demife to the plaintiff on the 13th of *April*, 1774, who entered on the fame day, and was ejected by the defendants.

1777.

Doe *verfus* Horde.

This cafe was argued twice; firft, in laft term, by Mr. *Buller* for the plaintiff, and Mr. *Kenyon* for the defendants. And again in this term, by Mr. *Bearcroft* for the plaintiff, and Serjeant *Glynn* for the defendants. Lord *Mansfield* was abfent, having given his opinion on the queftion in the year, 1757.

1777. Mr. *Buller* for the plaintiff, after stating the facts, argued as follows: The single question for the court to determine is, Whether, in the recovery suffered in *Hilary*, 1710, there was a *good tenant* to the *præcipe?* I am to contend there was not: And I shall consider the effect of this recovery upon two grounds. 1st. On the judgment in ejectment, and the possession under it. 2dly. Upon the feoffment. *First*, Sir *Robert Atkyns* gained nothing but a *mere possession* under the ejectment, without any freehold. The judgment was only to recover the *term*: Consequently, the derivative right under it, could only be the *possession* of the *term*. To support the recovery upon this ground, it must be contended that Sir *Robert* was a *disseisor* under the ejectment, and gained an *immediate freehold* to himself. But nothing short of an actual *ouster* could give him the freehold: For the true meaning and definition of a *disseisin*, as laid down in the books, is, "when a man enters into any lands or tenements "where his entry is not lawful, and *puts him out who has the* "*freehold*." *Litt. sect.* 279. To constitute a disseisin therefore, it must be without order of law, and by an *actual ouster* of the person who has the freehold: And thereby, the party gains the freehold to himself. The same doctrine is laid down in *Co. Litt.* 181, & 153. *b.* also in *Bracton, lib.* 4. *cap.* 2. *fol.* 160. *cap.* 3. *fol.* 161. *b.* "A disseisin is, where any one infeoffs an- "other of a *freehold* in prejudice of the true owner." These authorities decide effectually what a disseisin is; and that there may be a mere *wrongful possession, without a disseisin*. So also is the case of *Matheson* versus *Trott*, 1 *Leon.* 209. In the present case, though it is admitted that a fee was gained, yet the act itself amounting to a *wrongful possession* only, and *not* to an *ouster*; it is not a technical legal disseisin. Again, in 1 *Salk.* 246, it is expressly held, "that to work a disseisin or abate- "ment, there must be an *actual expulsion* of him who has the "right." Therefore under the judgment in ejectment in the present case, I contend there can be no disseisin; because the judgment and writ of possession gave no *right* of freehold; but left *that*, just as it was before: and if the ejectors had no right, they might be turned out by another ejectment the next day. —There is a distinction that runs through all the cases upon this subject, and reconciles the seeming contrariety between them; which is, that an entry may amount to a disseisin for the sake of advancing the remedy of him who has the right. *Cro. Car.* 303. *Palm.* 201. In the latter case. "tenant at will made a "lease

ATKYNS *versus* HORDE.

"lease for years: The original lessor did no act upon the land, "but he made a will and devised it: And the court adjudged the "devise good; in as much as it was a strong intimation that he did "not elect to admit himself disseised, but the contrary."—The case of Sir *Ambrose Cane*, cited in *Cro. Car.* 303. is to the same purport. There was a later case, *Metcalf ex dim. Kynaston* v. *Parry*, MSS. in *Scacc. Mich.* 1743. "Tenant in tail of lands, leased "by his father to a second son for lives under a power, upon his "father's death received the rent from the occupier as owner, and "as if no such lease had been made. He suffered a common re-"covery: And it was holden, that this was only a disseisin of the "freehold *at election*, and therefore, there was no good tenant to "the *præcipe*." That case was precisely the same as the present; except that this is rather stronger. Here Lady *Anne* could not even have elected to make it a disseisin; because the entry and possession under the ejectment were not *injustè et sine judicio*, which the writ of *novel disseisin* always supposes. Neither could she have *entered*: Because after a judgment in ejectment obtained against her, the court would not have suffered her to get possession unless by some other suit. If she could have elected to make it a disseisin, as far as she could, she did: For she brought another ejectment, recovered possession, and continued in possession till her death. Therefore, supposing either the judgment in ejectment, or the feoffment to be a disseisin, it was entirely done away by the subsequent possession of Dame *Anne*. Sir *Robert* stands more in the light of *tenant by sufferance*, than in that of a *disseisor*: Because his *possession* was by *act of law*: and in *Coke Littleton*, 271. a diversity is taken, "where one cometh to a "particular estate in lands by act of the party, and by act of "law:" Which is the case of tenant by sufferance, who cometh to the possession lawfully and then holdeth over.—Sir *Robert* entered by right in consequence of the judgment in ejectment: But he afterwards held her over by wrong; because the freehold was in another person.

1777.

DOE *versus* HORNE.

Further, disseisin is a *fact*, and therefore ought to have been found. Whereas, the verdict only finds that Sir *Robert* entered into possession in pursuance of the judgment in ejectment; and does not say Lady *Anne* was ousted. Consequently, as it is not found, the court will not presume it.

2dly, I am to consider the *effect* of the *feoffment* to *Earle*. It is clearly a feoffment in *form* only, not in substance: Therefore it cannot have the effect of a feoffment to a third per-

 son

1777. son for his own benefit. It was merely *fictitious*, for the benefit of Sir *Robert*, who continued in possession during the whole time. That circumstance alone is sufficient to make it void; and so it was determined in *White* v. *Bacon*, *Savil.* 126.—*Earle* never took the profits, nor was ever in possession: The feoffment was part of a family conveyance. If the persons making it had no power to convey, it could give no interest beyond what they themselves had. If it were held to go further, it would establish a precedent for every tenant in tail *in remainder*, with the concurrence of tenant for years only, to suffer a recovery against the consent of tenant for life, and so destroy half the family settlements in the kingdom. It would at the same time effectually destroy the established doctrine of recoveries, which makes the intervention of the tenant for life in possession indispensibly necessary.—Besides, this feoffment was secret and covinous: Therefore void within the doctrine of *Fermor's* case, 3 *Co.* 77. and *Co. Litt.* 357. *b.* "That in all cases where a man hath a rightful and just cause of action, yet if he of covin and consent do "raise up a tenant by wrong against whom he may recover, the "covin doth suffocate the right, so as the recovery, though "it be upon a good title, shall not bind or restore the demandant "to his right." *Fitzherbert's* case, 5 *Co.* 79. *b. S. P.* This latter case is exactly in point, for there the feoffment was by a person having merely a bare possession by fraud, with intent to bar the rights of third persons.—This is a most *unfavourable* case. Sir *Robert* got into possession by *mistake* of the law; and in consequence of that mistake, the present feoffment was made. But the law never works an injury.—If the feoffment were bad as being secret and covinous, no title can be *derived* under it. *Litt. sect.* 395. "If disseisor infeoff his father in fee, and the "father die seised, by which the lands descend to the disseisor as "heir, the assignee may well enter notwithstanding the de- "scent; and the disseisor shall be adjudged in but as a disseisor, "*quia particeps criminis.*" Here, Sir *Robert* was not only *particeps criminis*, but the only person criminal: for *Earle* never committed any disseisin. All that appears with respect to him is, that by indorsement upon the feoffment, livery was made to him: But that indorsement, for any thing that is shewn to the contrary, might be made without his privity. The disseisin was a fact which ought to have been found by the verdict, in order to enable the court to judge of it; and not being found, I hope the court will give the same opinion now, as was given in the year 1757.

DOE *versus* HORDE.

Mr.

Mr. *Kenyon*, *contra*, for the defendant.—On the former discussion of this case, great stress was laid upon the priority and posteriority of the two deeds; but I shall confine myself merely to the operation of the feoffment by Sir *Robert*; and I admit, that if a feoffment could have no effect because the party to whom it was made did not enter under it, and receive the profits, there would be an end of the question. But the authorities in the books speak a very different language: if they did not, every family settlement would be void. So, if the *non-privity* of the parties were to make it void, there would be an end of this question; for then it would be void as to all the remainder-men and reversioners.—It is said, *disseisin* is a *fact*. I say it is a *conclusion of law* from *facts*; and the great point here, is the operation of the feoffment in 1710.—The power of jointuring is *pro hâc vice* to be considered as well executed; therefore the question is, whether that power stood in the way of Sir *Robert Atkyns*?—The ejectment and feoffment were to disaffirm the title of Lady *Anne*; and there was no collusion between the parties. It is said Sir *Robert* got into possession by mistake. If a party gains a fee by right or by wrong, it is sufficient to give him a power of making a tenant to the *præcipe*. If Sir *Robert* entered *with* a *title*, it was *as tenant in tail*, and the verdict supposes him to be so. If *without title*, I say he entered as a *disseisor*, or at least obtained such a possession as entitled him to convey in the terms of the feoffment. The authorities in support of this position are to be found in 1 *Bur.* 60, 114. where the main drift of the argument was, what it is now. It has been said, that the party who is disseised, may consider the person who enters, as *a disseisor*, merely *for the benefit* of entitling himself to a writ of *novel disseisin*, and to advance his remedy against him. I admit there are several cases to be found which speak to that effect; but not one of them applies to the case of a feoffment, except that of *Metcalf, ex dim. Kynaston* versus *Parry*. But the least attention to that case will lay it entirely out of the present. There, *Kynaston* being *tenant for life* with a *power of leasing*, remainder in tail to his eldest son; made a lease to the *second* son. The *eldest* entered and took possession without obstruction from the lessee for life, received the rents and profits, and suffered a recovery which was held bad: But it was suffered before the stat. 14 *Geo.* 2. *c.* 20. How does that case apply here? There the tenant to the *præcipe* was made by lease and release; if so, there was an end of it; but if the

1777. Doe *versus* Hobbs.

party had made it by *feoffment*, it would have been good. A lease and release, bargain and sale, or covenant to stand seised were innocent for the purpose; and by them he could not give what he had not: but the maxim "*nemo dat, &c.*" does not apply to the case of a feoffment. He refered to the general cases relied upon by Mr. *Knowler*, in 1757, and cited *Popham.* 39. *Lit. sect.* 599. *Hunt* versus *Burn*, 1 *Salk.* 339. *Smith* versus *Fortescue*, 18 *Vin Abr.* 413. In 3 *Atk.* 562, Lord *Hardwicke*, talking of the distinction between a feoffment and other conveyances, says, "if the defendant had a mind to gain "an estate by *wrong*, he should have made a *feoffment with livery*, which would have been a *disseisin*: and then a fine levied "afterwards, and five years non-claim, would have been a bar." In 3 *Atk.* 339. Lord *Hardwicke* says in effect the same thing; "that a bare entry with feoffment by livery will gain a seisin." And 2 *Vez.* 481. is to the same effect as 3 *Atk.* 339. These cases alone shew it is the law of the land. All other conveyances are nothing to the purpose. Therefore *Earle* had an *estate of freehold* at the *time of the recovery*; and if he had, the recovery was *good*. With respect to the great inconvenience that has been mentioned, and the charge of collusion, the best answer to them is, by asking, why other inconveniences and wrongs which exist, remain unremedied? Why does collateral warranty descending, bar without any assets descending with it? Because such is the *lex scripta*. Why does the law protect a more remote estate, when it does not protect a nearer? Why may issue be barred? Why was the stat. *Hen.* 8. concerning fines with proclamations made?

It is said that Sir *Robert* entered as *tenant by sufferance*: I do not think it; nor as tenant in *any way*; for to enter as tenant, there must be a *privity* in the case; but there was no privity between Sir *Robert* and Lady *Anne*. Disseisins make a considerable head of the law in this country, at least, technical disseisins. If there is a technical disseisin in point of law, I hope the court will decide upon it, and adjudge that the recovery in this case is effectual.

Mr. *Buller* in reply. It is admitted that no person can suffer a recovery without the concurrence of tenant for life. In the present case, the recovery is not only *without* the *concurrence*, but *against* the express *inclination* of tenant for life; therefore, clearly bad. It is likewise admitted, that if disseisin is a fact, it ought to have been found. But it is said disseisin is not a

bare fact, but a conclusion of law from facts found. But the law says, "to make a disseisin, there must be an actual "*ouster*." And here no such fact is found by the verdict. Then, though there was no collusion between Sir *Robert* and Dame *Anne*, (and I never contended there was,) yet there was collusion between Sir *Robert* and *Earle*. Again, it is said Sir *Robert* was tenant in tail. Was he tenant in tail in possession? If he was not, he did not stand in a situation to enable him to suffer a recovery. The fact is, that he was tenant in tail in *remainder* only, and a tenant for life standing out against him. As to the doctrine laid down in 1 *Salk*. 339. and the other cases cited to the same point, they are distinguishable from the present. For none of them speak of *private* feoffments where the possession is not changed; but of public notorious feoffments with livery, upon the land; whereas the present is the case of a secret feoffment without any entry on the land or livery to the feoffee. Therefore there ought to be judgment for the plaintiff.

There being so much in print upon this subject already, I have omitted the second argument. After the counsel had finished, Mr. Justice *Aston* said, the case was treated in a most able and masterly manner in the reports of Sir *James Burrow* * That the court had looked into all the cases there cited; and would now re-consider them together with the arguments urged at the bar, and would give their opinions in the term. That the judgment in 1 *Bur*. 60. was a very great authority; but the court was now to give *their* opinion.

* 1 Bur. Rep 60.

Cur. adv. vult.

Afterwards, on this day, Mr. Justice *Aston* delivered the opinion of himself, Mr. Justice *Willes*, and Mr. Justice *Ashhurst*, (Lord *Mansfield* continuing absent,) to the following effect:

We have carefully examined all the cases cited in the arguments at the bar and the reports; which, together with the facts of the case, I shall state in the order in which they apply, that they may be the better understood.

Upon this record, the lessor of the plaintiff's title arises, under the will of Sir *Robert Atkyns* the elder, as *devisee* of a reversion in fee, after a limitation of an estate in tail male, determined in the year 1711, upon the death of Sir *Robert Atkyns* the younger, without issue male. The defendant's claim is as lineal descendant, and heir at law, of Sir *Robert Atkyns* the elder; and the lineage and pedigree are supported by the facts found. The great question upon the record is, "Whether a common reco-

1777. "very, suffered in the year 1710, by Sir *Robert Atkyns* the "younger, is a good recovery?" If it is, it has barred the lessor of the plaintiff's right. But that depends upon these circumstances: First, Whether Sir *Robert Atkyns* the younger was, at the time of the recovery suffered, tenant in tail in possession, or tenant in tail in remainder? and 2dly, if he was tenant in tail in remainder only, whether there was a good tenant to the *præcipe*?

DOE *versus* HOBBS.

As to the first question, it has been insisted, "That Dame "*Atkyns*, second wife of Sir *Robert Atkyns* the elder, had an "estate for life under the deed of the 26th *April*, 1681, pursuant "to a power contained in the great deed of the 12th *June*, 1669, "and that *she* did *not join* in any conveyance of the freehold, so "that there was no good tenant to the *præcipe*." In answer to this it has been said, "That she had no estate for life; for that "the deed called the *little* deed, bearing date likewise on the "12th *June* 1669, was executed after the *great* deed of the same "date, and that therein no mention is made of such power: "And that the power given to Sir *Robert Atkyns* the father, in "the greater deed was extinguished by a fine in 1669." The priority of these deeds of the same date not being found, the court must judge of that priority from all the circumstances of the case, the nature of the transaction, and the internal evidence of the instruments themselves. The little deed is declared to be made, "In consideration of Dame *Mary* releasing and acquit-"ting a former jointure, and for the purpose of making a new "provision for her according to the covenants specified in that "deed." What that former jointure was, does not appear; but the intention of the parties in this deed is manifest, that it was in order to facilitate the new family settlement. By Dame *Mary*'s having thus released and acquitted her former jointure, these lands were liable to the settlement that was to be made by the great deed, upon consideration of the new marriage there specified. The great deed makes no recital of this release and acquittal by Dame *Mary*; but it executes the covenant of the new jointure to be made to her: that is, by settling the very same premises on her as were settled by the little deed. It was therefore plainly a transaction of convenience and accommodation between the parties for their mutual benefit. And it would be harsh indeed, to construe the little deed as made subsequent to the great deed, when the great deed carries the provisions of the less into execution. But by the contrary construction both deeds

have

have their effect; and a construction of that sort ought to take place in all cases; for the intent could never be, *uno flatu*, to create a provision by one deed, and to destroy it by the other. The fine levied comprises all the premises in the greater deed. They are *partes ejusdem negotii*, distinctly executed, and most probably for the convenience of the jointress Dame *Mary*; for she had the custody of one; and when she died, it was placed amongst the family writings. In addition to this the subsequent acts done by Sir *Robert* the father, strongly prove that he considered the powers as subsisting.

We are therefore of opinion, that the *little deed* must be construed to have been *first* executed; that the power of jointuring under the great deed did subsist, and was well executed; and that Dame *Anne* had an estate for life in the premises under the deed in 1681: And it is found by the verdict, that she entered and was in possession. If there was an estate for life in Dame *Anne*, Sir *Robert Atkyns* the younger could only be tenant in tail in remainder, expectant upon the determination of her estate for life.

The next question is, "Whether there was a good tenant to "the *præcipe?*" The facts relative to this particular are, "That "Sir *Robert Atkyns* the younger, in pursuance of a judgment in "ejectment brought against Dame *Anne Atkyns*, and the tenant "in possession of the premises, *Trin.* 9 *Ann.* by *John Phillips*, "upon the several demises of the said Sir *Robert* and *Joseph* "*Walker*, entered upon those premises." Upon the 1st of *January*, 1710, *John Phillips* surrendered both these terms to Sir *Robert Atkyns* the younger; but it must be remembered that these were only *fictitious* terms; one of them, granted by Sir *Robert Atkyns* himself; and therefore, the recovery in ejectment could not change the nature of Sir *Robert Atkyns*'s possession. Sir *Robert Atkyns* the son, being so in possession, makes a feoffment with livery of seisin to *James Earle* in fee, for *the declared purpose and intent of making him a tenant to the præcipe.* In *Hil.* Term, 9 *Anne*, a recovery was suffered by the premises, wherein *John Holmden* was demandant, *James Earle* tenant, and Sir *Robert Atkyns* the younger, and *Lovis* his wife, are the vouchees.—The validity of this recovery depends upon considering the *effect* of the judgment and possession under the ejectment, and the *nature* of the subsequent feoffment to *James Earle*. It is said, that if Sir *Robert* the son entered by wrong, he is a disseisor: That, possession only will support a feoffment; (to which point there

1777. — Doe *versus* Horde.

there are many authorities cited in 1 *Bur. Rep.* 92. 94.) and that the poſſeſſion itſelf in this caſe under the judgment in ejectment was a diſſeiſin.

Secondly, it is ſaid, if he came in by right, he would be in according to his title: that, the poſſeſſion and title would then unite, and together would give him a power to ſuffer a recovery.

To this it has been anſwered, and we are of opinion, 1. That the taking poſſeſſion under the judgment in ejectment, can never amount to a diſſeiſin of the freehold: for the definition of a diſſeiſin laid down by *Litt. ſect.* 279. is, "Where a "man entereth into any lands or tenements, where his entrance "is *not congeable*, and *ouſteth* him who has the *freehold*." So that *every entry* is *not* a *diſſeiſin*, unleſs there be likewiſe an *ouſter* of the freehold. *Littleton* therefore connects theſe two circumſtances together. So, *Coke* in his *Commentary* upon *Lit.* 153. ſays, "A diſſeiſin is the putting a man *out* of *ſeiſin*, and ever "implieth a wrong." But, "*diſpoſſeſſion* or ejectment, is a "putting *out* of *poſſeſſion*; and may be by right or by wrong." And again, "Diſſeiſin is a perſonal treſpaſs, or tortious *ouſter* of "the ſeiſin."

Now we obſerve, that it is not in fact found, "That Dame "*Atkyns* was *ever ouſted* of the *freehold*; or that Sir *Robert Atkyns* "the younger, was *ever ſeiſed* of it." The judgment in ejectment was a recovery of the poſſeſſion only, without prejudice to the right of thoſe in whom it might afterwards appear to be. That poſſeſſion therefore, gave no more right to Sir *Robert Atkyns* than he had before, and he might have been turned out by any ſubſequent ejectment. He did not take a tortious fee under the judgment, nor could the ſheriff deliver it; for the words of the writ are only "*Habere facias poſ-* "*ſeſſionem.*"

Sir *Robert Atkyns* had no right at the time of the entry to an eſtate tail in poſſeſſion; for the jointreſs had then an eſtate of freehold. The ejectment could recover nothing but the poſſeſſion. Verdict and judgment gave him no more; no freehold was recovered under it, but only the term; though, if he really had a *right* of *freehold in poſſeſſion*, in tail, or in fee, the poſſeſſion under the ejectment would have *enured* according to the *right*.

An argument has been drawn from the power of the true owner to make his election, whether he will conſider it a diſſeiſin or not. But here, the true owner could not elect to make him

a disseisor: the entry not being *injuste et sine judicio*; and Sir *Robert* would not have been liable to a fine, as antiently every disseisor was. A true owner may enter upon an actual disseisor; but here, the entry could not have been admitted; nor *did* Lady *Anne elect* to make Sir *Robert* a disseisor; for she afterwards brought her ejectment. For the doctrine of elective disseisin I refer you to 1 *Bur. Rep.* 110, 111, 112.

The ground therefore of our opinion is founded in this; that here, there was no actual nor constructive disseisin; Sir *Robert Atkyns* gained no freehold by it, he had only a naked possession: there was no *ouster* of the true owner; but the freehold remained not displaced, with Dame *Anne*, remainder in tail to Sir *Robert Atkyns*.

The next question is, Whether the feoffment made a good tenant to the *præcipe*, without the concurrence of the jointress? Sir *Robert Atkyns* not being tenant in tail in possession, bargain and sale, or fine, would not do. Feoffment would not make a discontinuance. 1 *Rol. Abr. tit. Discontinuance*, 634. *pl.* 5. Would it make a disseisin? If it were taken to be a disseisin, it must be at the election of the right owner, according to the doctrine laid down in 2 *Inst.* 412, 413, for the sake of the remedy. Sir *Robert Atkyns* the son had not the freehold in fact, for there was no expulsion of the true owner; it was a feoffment, with livery in *form* only; there was no transmutation of possession to the feoffee. No estate, not even an interest, passed to *Earle* for his own use; it being made for the avowed purpose only of making him a tenant to the *præcipe*. Sir *Robert Atkyns* continued in possession; the feoffment was no more than a part of that common assurance called a common recovery; and there was no thought of a disseisin at the time: for on the facts found it is clear, that Sir *Robert Atkyns did* consider himself as *tenant in tail in possession, under* the judgment in *ejectment*; that the little deed was posterior to, and corrected the great one, and that *no freehold subsisted*, or stood out *against the tenant in tail.* But it turns out, that all this was grounded on a mistake of Sir *Robert Atkyns*, and that Dame *Anne had* an estate for life for her jointure. The true meaning therefore of this feoffment was, to make a tenant to the *præcipe*, Sir *Robert Atkyns* considering himself as being tenant in tail in possession, without any idea or intention of its working a disseisin, and that thought was an afterthought.

But

1777. Doe versus Hordd.

But as it is not every entry, so neither is it *every livery* that will make a *disseisin*. Livery is of the very *essence* of a feoffment. But where the books speak of feoffments in fee by tenant for years, and that the fee-simple passes thereby, it is to be understood of those feoffments of old, attended with *livery* and *actual* transmutation of the possession from one man to another. *Bract. book* 2. *c.* 18. *b.* 4. 161. *b. Year book*, 11 *Hen.* 4. 33. *pl.* 61. *a. Brooke Abr.* tit. *Feoffments de terres*, *pl.* 10. *West. Symb. sect.* 251. and many other authorities cited in the report by Sir *James Burrow*.—There was a *privity* and confidence between the particular tenant and the reversioner. Tenant for years forfeited his estate by altering the possession: And on account of such possession and the notoriousness of the act of investiture, the feoffee ousted the reversioner. It was a translation of the feud from one man to another. But there was no idea of such a change being worked by a private secret contract of the parties; because that would make it difficult for the Lord to know with whom the estate was lodged, and for strangers to bring their action. Such was the practice before men were acquainted with letters, when lands passed by parol; and livery was necessary to be made on the land, that the other tenants who were called to the lord's court might be witnesses. I say, it was formerly necessary to be done, for this reason, because the *pares curiæ* and the vassals of the lord, being bound by their oath of fealty, would take care that no fraud should be committed, which strangers, not held by the same tie, might connive at.

In *Wright*'s law of *tenures*, *p.* 151. he says, "a feoffment, "whether constituting, or transferring a fee, retains, even *at this* "*day*, the form of a gift. It is perfected and ratified by the "same solemnity of *livery* and *seisin* or investiture, as a pure feu-"dal donation." Though, afterwards the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses; yet the trial has still been reserved to the *pares* or jury of the country; but the particular requisites of this form of conveyance have dwindled away; they have, from having been the only conveyance of land for a long series of years, languished into a mere form, and are nothing more than a common conveyance. Their grandeur and efficacy is lost; and without an actual transferring of the estate from one man to another, they mix with the community of all other assurances. In 3 *Atk.* 140. in the case of *Smith on the demise of Dormer* versus *Parkhurst*, Lord Chief Justice *Willes* treats feoffments

feoffments in the same light, when he says, "they materially "differ from a fine; for in notoriety of fact, a feoffment is supposed to be made *openly upon the land*, and the feoffee is immediately put into possession:" Not a formal, but an actual possession.

The general notion of their being a security against secresy and fraud, was a substantial reason which gave so much consequence to the feoffments of old. The cases of *Hunt* v. *Bourne**, *Read* and *Morpeth* v. *Errington*†, and the cases cited from *Vezey*‡ to prove the superiority of feoffments over fines, we consider to mean such feoffments of old; for they are mere *dicta*. With respect to the case from *Viner*, title Remainder, *p*. 414, I have a note of it of my own taking, and can venture to say, that Lord Chief Justice *Lee* did not rely upon the distinction stated by the gentlemen at the bar. The name of these feoffments and the remembrance of them remains and survives them, however imperfectly, after the practice of making them, and the consequence of their solemnity is quite at an end. But the present feoffment is of a different sort; it is *secret*, and by a wrong doer; and the feoffee, a *mere instrument*; for it is solely for the purpose of making him a tenant to the *præcipe*. In law therefore, he is a mere instrument, and so considered in 2 *Rol. Rep*. 245. *Cro. Jac*. 643. S. C. 1 *Mod*. 107. *Fountain* v. *Cooke*. —It is not here said to be for his own use; nor need it be so, when it is merely for the purpose of making a tenant to the *præcipe*; but then, the party must have a *right* to suffer the recovery. If it is carried any further, it is fraudulent; and shall not be carried into execution by artificial reasoning to the prejudice of those who have the right. As to this point therefore, we concur with the authority of *Fermor's* case§, cited in Sir *J. Bur*. 117.

* *Salk*. 339.

† *Cro. Eliz*. 321.

‡ 2 *Vez*. 475, 6.

§ 3 *Co*. 87.

No aid can be given to this recovery from the stat. 14 *Geo*. 2. *c*. 22. because it requires the concurrence of the first estate for life expresly. We think the recovery therefore, in the present case, bad: 1st, because "there has been no *disseisin* at all of "Dame *Anne*; 2dly, *no ouster* of her *freehold*; 3dly, that the "feoffment was made really under an idea of having a right to "suffer a recovery, and not with any intention to constitute a "disseisin. 4thly, If it were done with that intention, we think "it amounts to a feoffment in *form* only, and is not such a feoff-"ment as was in use of old; no transmutation of the possession "passed by it; but its object was secret and collusive; and there-"fore it ought not to work a constructive disseisin. *Lastly*, That "Sir

1777. Doe *versus* Hoare.

" *Robert Atkyns* by his entry under the judgment in ejectment " gained no freehold; and by this feoffment conveyed no es-" tate to the prejudice of Dame *Anne*'s freehold."

The consequence is, that there must be judgment for the plaintiff.

Friday, Nov. 25th.

Doe, *ex dim.* Watson *et al. versus* Routledge.

To make a *voluntary* settlement *void* against a subsequent purchasor within the stat. 27 *El.* c. 4. it must be *covinous* and *fraudulent*; not *voluntary only.* A purchasor, to entitle himself to the protection of the statute against such *fraudulent* settlement and to set it aside, must be a purchasor *bonâ fide*, or for *good consideration*; as *marriage* but the consideration need not be money. *Quære*, If copyholds are within the stat. 27 *El.* c. 4.?

IN ejectment, the jury found a verdict for the defendant, subject to the opinion of the court on the following case:

That *William Watson*, being seised in fee according to the custom of the manor of *Hexham* of the copyhold tenements, mentioned in the declaration, on the 17th *December* 1763, executed a *letter of attorney to John Green*, authorizing him to *surrender* the same to the use of the said *William Watson for his life*, and after his decease to the defendant *Routledge* (who was *his nephew* by a sister) his heirs and assigns for ever; which surrender was accordingly made, on the 21st of the same *December*; and *William Watson* was admitted thereupon. This was *voluntary*, and *without any consideration, other than natural love and affection.*

That in the year 1767 the defendant paid his addresses to *Hannah Bell*; and a copy of the said surrender was shewn by the defendant to her and her father; who thereupon gave their consent to the marriage, which soon after happened.

That *William Watson* afterwards, on the 11th of *January*, 1773, *surrendered* the same premises to the *use of Hugh Watson*, the *lessor* of the plaintiff in the first demise, and who was his *nephew* by a younger brother, his heirs and assigns for ever; and by a *deed* of the same date, executed by *William Watson*, *reciting* that *Hugh Watson*, upon the proposal and *at the request of William Watson*, had come to an *agreement* with *William Watson* for the absolute *purchase* of the said premises for the *sum of* 200 *l.* and reciting the said surrender; in pursuance thereof *William Watson* acknowledges the receipt of the 200 *l.* from *Hugh Watson*, in full for the purchase of the premises; and covenants with *Hugh Watson*, that he, *William Watson*, was owner of the premises, and had good right to surrender the same to *Hugh Watson* and his heirs; that they might quietly enjoy the same, free from incumbrances; and that *William Watson* and his heirs would make further assurance. There is a receipt on the back of the deed for the consideration money, signed by *William Watson*; and the money was proved to have been paid by *Hugh*

Watson

Watson to *William Watson*, at the execution of the deed. *Hugh Watson* was on the 12th of *January*, 1773, admitted upon the said surrender, and entered into possession of the premises. 1777.

Doe *versus* Routledge.

That *Hugh Watson*, some time *before*, and *at the time* of, the surrender to him in 1773, *knew* of the *former surrender* in 1763. That the premises, at the time of the last surrender to *Hugh Watson*, were worth between 50 *l.* and 60 *l. per annum*; and the inheritance worth between 1800 *l.* and 2000 *l.* That *William Watson* died on the 21st *January* 1774, and the defendant *Routledge* brought this ejectment; and thereby got possession of the premises; *Hugh Watson* then being a prisoner for debt in *Carlisle* gaol, having been committed on or about the 28th *April*, 1774, and making no defence to the action. That *Hugh Watson* afterwards took the benefit of the insolvent debtors' act; and that *Lowthian* and *Armstrong*, the two lessors in the second demise, are assignees of all *Hugh Watson*'s estate and effects under the said act, by an assignment made the 7th *October* 1774. The question was, Whether the plaintiffs were entitled to recover? and if they were, then a verdict was to be entered accordingly.

Mr. *Wood* for the lessor of the plaintiff. The point made by the plaintiffs at the trial was, that the *first* surrender in 1763, being *merely voluntary*, was by force of the stat. 27 *El. c.* 4. null and *void*, in respect of the second surrender in 1773, under which he claimed; he being therein a *bonâ fide* purchasor of the premises in question for a *valuable consideration*. *E contra*, it was contended, on the part of the defendant, 1. That the stat. 27 *El. c.* 4. does *not extend to copyholds*: 2. That a purchasor for the consideration of 200 *l.* only, where the estate was fairly worth 2000 *l.* is not such a purchasor as the statute meant to protect against a prior voluntary settlement.—As to the first point, the general words of the statute, *viz.* "every estate in "lands, tenements, or other *hereditaments whatsoever*" are in themselves clearly large enough to comprise *every* species and denomination of estate of whatever quality. If so, there is no reason in law, policy, or common sense, why they should not be construed to extend to copyholds. The distinction upon which copyholds, in ancient times, were adjudged not to be within the provision of some of the earlier statutes, as the stat. of *West.* 2. *de donis conditionalibus*, and the stat. 13 *Ed.* 1. of *elegits*, is foreign to this case. In those times, copyholds were mere tenures in villenage; the ground therefore upon which they were

1777.
Doe *versus* Routledge.

were held to be excluded, unless particularly mentioned, was for the sake of the lord, that strangers might not be imposed upon him against his consent. But that reason has ceased long ago; and so it had, before the stat. 27 *Eliz. c.* 4; copyholds being at that time fixed and permanent, subject to alienation, and to every species of modification incident to freehold estates. The true rule to go by, is laid down in *Heydon*'s case, 3 *Co.* 8. where upon debate, in what cases the general words of an act of parliament shall extend to copyhold estates, it was agreed by the whole court, "that where an act of parliament *alters* the *service*, "tenure or interest in the land, in *prejudice* of the *lord* or *tenant*, "there the general words of such act shall *not* extend to copy-"holds; but if made for the good of the weal public, and *no* "prejudice ensues to the *lord* or *tenant*, there, copyholds *are* "*within* the general purview of it:" and accordingly it was there adjudged, that copyholds were within that branch of the stat. 31 *Hen.* 8. *c.* 13. which avoids all leases by ecclesiastical persons contrary to the provisions there made. Now the principle of that case is particularly applicable to the present; both statutes being made in suppression of fraud; *that*, to prevent *fraudulent leases*; *this*, to prevent *fraudulent grants*. The above rule has been the leading principle in all subsequent cases, 4 *Co.* 26. upon the stat. 32 *Hen.* 8. *c.* 9. against buying of titles. 9 *Co.* 104. *Margaret Podger*'s case upon the stat. 4 *Hen.* 7. *c.* 24. of fines. 6 *Co.* 37. upon the statute 13 *El. c.* 10. *Glover* versus *Cope*, 3 *Lev.* 326. *Carthew*, 205. S. C. upon the stat. 32 *Hen.* 8. *c.* 34. in which latter case, the court said, "that the "only reason why copyholds have been adjudged not to be "within the purview of other statutes is, because of their be-"ing a prejudice to the lord." But here, no possible prejudice can arise to the lord; it can work no alteration in the service, tenure or interest of the land; it will vary no custom of the manor; nor can any injury arise to the tenant. No reason can be assigned either in policy or common sense why the purview of the stat. 27 *El c.* 4. should not extend to copyholds; it is for the publick weal that it should; and except a *dictum* of *Blencowe*, justice, in the *law of nisi prius* 108. there is no case or authority against it.—The *next question is*, Whether the *consideration* that passed in this case under the second surrender, is such a consideration as will *defeat* the *first voluntary* settlement? As to this part of the case, *two* of the facts stated are totally immaterial. 1*st*. The defendant's *marriage*; because it does not appear, that either *William Watson* or *Hugh Watson* were *privy* to the first surrender

being

1777.

DOE *versus* ROUTLEDGE.

being ſhewn to the defendant's wife and her father, before the marriage. 2*dly*, That *Hugh Watſon* had *notice* of the firſt ſurrender. But it has been decided that ſuch notice makes no difference; becauſe the ſtatute expreſsly ſays, that ſuch fraudulent conveyance ſhall be void; 5 *Co.* 60. *Gooch*'s caſe. The ſingle queſtion therefore is, Whether a purchaſor for a *valuable conſideration*, but ſhort of the *full* value, ſhall defeat a mere voluntary purchaſor who has given no conſideration at all. Now the words of the ſtatute are, "for *money or other good conſider*-"*ation*," and they are repeated in different ſections; 2. 4, 5. But in no part of the ſtatute is it ſaid, "the *exact full* value muſt be "given;" nor do the words "*good conſideration*," in their natural acceptation and meaning, import "*full value*." All they mean is that a *valuable conſideration* ſhall be given: And ſo are all the authorities in the books. *Twine*'s caſe, 3 *Rep.* 80. *Reports temp. Finch*, 102. *Caſ. temp. Talbot*, 64. 3 *Wilſ.* 356. Here, 200 *l.* was actually and *bonâ fide* paid, and the receipt of it acknowledged in the deed. There is no pretence to ſay that any indirect means were uſed to obtain this ſubſequent ſurrender. The party was *ſui juris*, and he has even covenanted for further aſſurance. Had the conſideration been merely *colourable* or *nominal* only, as 5 *s.* I admit it would have been bad. But it is a valuable conſideration *bonâ fide* paid by one party and received by the other, and therefore clearly protected by the ſtatute againſt the prior voluntary ſettlement.

Lord *Mansfield*.—The ſtatute does not ſay a *voluntary* ſettlement ſhall be void, but that a *fraudulent* ſettlement ſhall be void. There is no part of the act of parliament, which affects voluntary ſettlements *eo nomine*, unleſs they are fraudulent. To be ſure, it is very difficult againſt fair honeſt creditors to ſupport a voluntary ſettlement. It is laid down in a caſe by *Hale* that a voluntary ſettlement may be good. And the caſes cited from *Talbot* and *Wilſon* ſupport that doctrine:—I remember a caſe before Lord *Hardwicke*, where a woman who was poſſeſſed of an eſtate, and having children by a former huſband, was about to marry again. But before ſhe married, and becauſe ſhe was going to marry, ſhe made a voluntary ſettlement of her eſtate upon her children. Her ſecond huſband afterwards perſuaded her to join in a ſale of this eſtate for a valuable conſideration; and the queſtion was, Whether the ſettlement was void? The court held, that her doing a rational act without any intention or view of defeating any body, would not render the ſettlement fraudulent, though it was abſolutely voluntary. The

1777. name of this cafe was *Newftead* verfus *Scarle*. I remember another caufe before Sir *Thomas Clarke* who fat for the Chancellor, where the queftion was, Whether a voluntary fettlement fhould be confidered as fraudulent?

DOE *verfus* ROUTLEDGE.

Mr. *Norton* for the defendant, fubmitted *four points* to the confideration of the court; alledging that if he was right in *any one* of the four, the defendant would be entitled to retain the verdict. *Firft*, That the copyholds not being within the mifchief intended to be remedied by the act, were not comprehended under the general words "lands and tenements" ufed in the ftat. 27 *El.* c. 4. *Secondly*, that the furrender in favour of the defendant *Routledge*, though made from the confideration of natural love and affection only, was not fraudulent, and therefore void, as againft the leffor of the plaintiff. *Thirdly*, That if it was void, at the commencement, it became good afterwards from its being the principal motive and inducement to *Hannah Bell's* marriage with the defendant. And *fourthly*, on which point he principally relied, that the *fecond* furrender in favour of the leffor of the plaintiff, was itfelf *fraudulent* and void, the furrenderee having had notice of the former furrender, and paying no more than 200 *l.* for the premifes, when their real and known value was 2000 *l.* In fupport of the 1ft point, he cited 3 *Co.* 9. *a.* on the conftruction of ftat. 13 *Ed.* 1. which gives an *elegit*, and was adjudged not to extend to copyholds. *Cro. Car.* 44. on the ftat. 27 *H.* 8. which transfers the poffeffion to the ufe. *Lut.* 1190. on the ftat. 12 *Car.* 2. 24. which enables a father to difpofe of the guardianfhip of his fon; and *Buller's Ni. Pri. p.* 108 —Of the fecond point, 2 *Vern.* 44.—Of the third, *Douglas* and *Ward*, *Chan. Cafes*, 100. 1 *Lev.* 150. 1 *Sid.* 134. *Eq. Rep.* 37. *Pre. Ch.* 275. And of the fourth point, 3 *Co.* 83. *b.* *Cro. Eliz.* 445. 3 *Co.* 77. 1 *Bur. Rep.* 396. And upon thefe authorities prayed the court to give judgment for the defendant.

Lord MANSFIELD, after ftating the cafe, delivered his opinion as follows: The queftion referved upon the fpecial cafe is, "Whether the plaintiffs are entitled to recover?"

In the argument of this cafe, *four* queftions have arifen. The firft, "Whether the ftat. 27 *El.* c. 4. extends to copyhold "eftates?" If it does, then *fecondly*, "Whether the firft deed, of "1763, is, under all the circumftances of this cafe, a *fraudulent co-* "*vinous* deed within the true intent and meaning of the ftatute?" If it is, then the *third* queftion that arifes is, "Whether the plaintiff "comes under fuch a fettlement within the meaning of that ftatute,

"as

"as will entitle him to have the other ſet aſide?" The *fourth* and laſt queſtion, which however was not made at the bar, but "which in my mind may ariſe, is, Whether if the firſt deed can-"not be ſet aſide in *toto* for the benefit of the aſſignees, the bank-"rupt has any right, as againſt the preſent defendant, to be con-"ſidered as an incumbrancer for 200 *l.* the purchaſe money?"

As to the *firſt* queſtion, there is great reaſon to ſay, that the ſtat. 27 *El. c.* 4. does extend to copyhold eſtates: But it is ſtrange that ſuch a point ſhould be firſt agitated at this time. I ſhould rather think it has been taken for granted, that the ſtatute *does extend* to copyhold eſtates; becauſe, in being ſo conſtrued, it can work no prejudice to the Lord; and the object of the ſtatute is to ſuppreſs fraud. But it is not neceſſary abſolutely to determine that queſtion. I will ſuppoſe for the ſake of argument that it does; and ſuppoſing it does, I am ſtill of opinion againſt the plaintiff in this caſe.—The next queſtion then is, Whether the ſettlement of 1763 is, under all the circumſtances of this caſe, *covinous* and *fraudulent* within the true intent and meaning of the ſtat. 27 *El. c.* 4.? Now, in that ſtatute, there is not a word that impeaches *voluntary* ſettlements, merely *as* being *voluntary* ſettlements; but as *fraudulent* and *covinous*. The title of the ſtatute is, "againſt *covinous* and *fraudu-*"*lent* conveyances," where *nominally* one man *paſſes*, and where *nominally* his eſtate is *conveyed*, to another; but where in fact, it is agreed that the grantor ſhall keep it to his own uſe, and ſo to anſwer other purpoſes of fraud.

The *enacting* part conſiders it in the ſame light, and makes an expreſs proviſion againſt ſuch practices, as if they were a *crime*: For it ſays, (*ſect.* 3.) "that all parties, &c. to ſuch fraudulent "grants, &c. who ſhall attempt to defend the ſame, ſhall *forfeit* "*one year's value of the lands*, &c. ſo purchaſed, and alſo being "lawfully convicted, ſhall *ſuffer ſix months' impriſonment* with-"out, &c." But no perſon making a *voluntary* ſettlement by way of *proviſion for his family*, was ever conſidered in that criminal light. Where a fraudulent uſe is made of a ſettlement, that indeed may be carried back to the time when the fraud commenced.

A cuſtom has prevailed and leant extremely, to conſtrue voluntary ſettlements fraudulent againſt creditors. But if the circumſtances of the tranſaction ſhew it was *not* fraudulent *at the time*, it is not within the meaning of the ſtatutes, though no money was paid. For inſtance, what is generally done in marriage ſettlements. If a father upon the marriage of his

1777. DOE *versus* ROUTLEDGE.

eldest son, in a settlement upon him, makes remainders to half a dozen younger brothers after the consideration of the marriage, those remainders are good within the meaning of the statute against any claim of creditors. And the reason is, because it was a *good* settlement *at the time*. A father has a right to give his estate to all his children; and therefore may fairly say, unless you agree to these limitations, I will not join. Again, a marriage is had: Supposing any relation has money in his hands belonging to the woman; and says, "I will not pay the money unless "you make a settlement."—A settlement in consequence is made. It is a *voluntary* settlement; but the court will say, it is a *good* consideration.—Again, the case of *Newstead* v. *Searle* is very strong. There a woman going to marry a second husband, makes a settlement on her children by her first husband. This was a transaction very proper at the time, without any intention on her part of defeating it afterwards; but on the contrary, meaning to put the estate out of her own power by making the settlement. That made it good, though a voluntary settlement.

One great circumstance which should always be attended to in these transactions is, Whether the person was *indebted* at the time he made the settlement: If he was, it is a strong badge of fraud. In the present case it is not expressly stated, but I take it for granted, that *William Watson* had no children of his own. He had different nephews. In 1763 he meant to make, and did make, a settlement on his nephew by his sister. This was notorious to the whole country; it was entered upon the records of the court, and every body might, and did see it. What is the consequence of it? The nephew gets credit: for it is not a secret private transaction: And though what happened previous to the marriage cannot be coupled with this case, because the knowledge of it cannot be brought home to *William* or *Hugh Watson*; yet it shews that that happened which in general is supposed to happen from an act of this kind. The party gains credit by it. And if it gave him credit, he might likewise get a marriage by it. He appears therefore publickly for ten years together, with the knowledge of his uncle, entitled to the inheritance of his estate. There is no allegation that *William Watson* the uncle owed a farthing at that time, or left a single debt undischarged at his death. On what ground then can this *first* surrender be considered or construed, *covinous* or *fraudulent*?—With respect to *notice*, in the case of creditors, it is not material, whether a subsequent purchasor has notice or not, of a former fraudulent settlement: For it has been determined at law, and therefore must stand, that

a man's having notice of a former settlement which was fraudulent, shall not prevent his avoiding it the same as if he had been ignorant of it: because if he knew the transaction, he knew it was void by law *. But there was no notion at that time, that courts of law, in modern determinations, would have gone so far as they have done, in construing voluntary settlements fraudulent against creditors.

1777. — DOE *versus* ROUTLEDGE.

* 5 Co. 60. 3 Ch. 83 — *Wood's Convey.* 504.

But in respect of *voluntary family settlements*, to be sure, notice varies it much. In the case of a latter statute, the *Register Act*†, though it is said there positively, "That a registered deed shall "take place of an unregistered deed," from whence it might be argued, that if a person knew of an unregistered deed, it should not stand against him: Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside: because he has that notice which the act of parliament intended he should have.

† Stat. 7 *Ann* c. 20.

I now come to the consideration of the *third* question, "Whether the deed of 1773 is such a deed as is entitled to pro-"tection, and ought to set the other aside?" In order to do that it should be a *bonâ fide transaction*, and a *fair purchase*, in the understanding of mankind; or for a *good consideration*, as a settlement upon a marriage, in consideration of the marriage; and there, such a settlement would set aside and take place of a former fraudulent deed. It is not necessary that it should be for money: but it must be a fair *bonâ fide* transaction: if it is colourable, only it cannot stand.

Now, what are the circumstances of the second settlement in the present case? Manifestly a mere contrivance. The plaintiff had notice of the former settlement. *William Watson* the uncle had changed his mind: What was to be done to set the prior deed aside? A new one was to be made under such circumstances, and for such a consideration, as they thought would effectuate the purpose. They agree, therefore, that all affection was to be left out; no generosity to appear or be mentioned: but the plaintiff is, "*at the request of the seller*," to agree to give a price which it is to be supposed fully satisfies the seller. It is a gross fraud and no purchase at all: The consideration of 200 *l.* which is to support it as a deed for valuable consideration, compared with the real value 2000*l.* shews it to have been no purchase at all; but a *gift*.

Then comes the *fourth* question, which may arise in this case, "Whether, as against the present defendant, the assignees of the

1777. Doe *versus* Routledge.

"plaintiff *Hugh Watson* are entitled to be considered as incumbrancers for 200*l*?" As to that, most undoubtedly, if *William Watson* himself had come to be relieved against this settlement in 1773, saying, it was by collusion, and a fraud against the first, he could not be relieved without paying the 200*l*.; and the complete relief would be, to put things just in the situation they were before. But that is not this case; for here the plaintiff comes against a third person, whose estate *William Watson* the vendor could not charge with a farthing: And, moreover, he comes fraudulently, with full notice that the estate had been settled upon the defendant ten years. There is no colour therefore to set up any claim against the defendant to this sum of money.

Mr. Justice Aston.—As to the purchase money (the 200*l*.) the assignees cannot come against the defendant *Routledge*, but they may come upon the assets of *William Watson*.

With respect to the statute 27 *El. c.* 4. the case in *Finch Rep.* 102. seems to me to bring the deed of 1763 within that statute, as being a deed upon good consideration. But first, as to that statute extending to copyholds. There are cases, where the words "lands tenements and hereditaments," have been considered as extending to copyhold estates as well as to other lands. The reason why they have been construed not to be included in the statute of *Elegit*, 13 *Ed.* 1. the stat. 27 *Hen.* 8. and the stat. 12 *Car.* 2. *c.* 24. is, because otherwise a prejudice would arise to the lord, and an alteration of the tenant without his consent. I should rather think this statute did extend to copyholds, than not. But it is not necessary absolutely to decide that point.

Then, as to the first settlement being a good one within the meaning of the statute 27 *El. c.* 4. there is no doubt, but when *William Watson*, the uncle, was admitted to this estate, under the first surrender, which he had taken to himself for life, with remainder to his nephew the defendant in 1763; the surrender was good: And admittance to his own estate for life, was an admittance likewise of his nephew in remainder; it was notorious, and gave fair credit to the nephew. A great deal has been said upon the construction of the stat. 27 *El. c.* 4. Whether there should be a *full* as well as a *bonâ fide* consideration? It has been said that a *bonâ fide* consideration only, is *not* sufficient—but it is; and the consideration need *not* be *full*; for a *mortgage* is a good consideration, though never a full one. The transaction in 1763 is a very fair one; but the subsequent surrender in 1773, from the circumstances of it, is by no means so; for the

purchase

purchase money, which is only 200*l.* is not for the inheritance singly, but likewise for the estate for life of *William Watson*; and the receipt expresses it to be *in full*; whereas it is not so; for the value of them both together is found to be at least 2000*l.*

Mr. Justice WILLES said, he was of the same opinion, but desired it might be observed, the court gave no absolute opinion upon the first question, "Whether the stat. 27 *El. c.* 4. extended "to copyholds?"

ASHHURST, Justice, concurred.

Judgment for the defendant.

PUGH, *et uxor*, *versus* Duke of LEEDS.

Monday, Nov. 28th.

One, under a power reserved in his marriage settlement to lease for 21 years in *possession*, but *not in reversion*, grants a lease to his only daughter for 21 years, to commence *from the day of the date*, Adjudged a good lease.—The word "*from*" may mean either *inclusive* or *exclusive*, according to the *context* and *subject matter*: And the court will construe it so as to *effectuate* the deeds of parties, and not to *destroy* them.

THIS was an issue to try whether a lease made by one *Godolphin Edwards*, to *Elizabeth Pugh* the plaintiff's wife, and only daughter of the said *Godolphin Edwards*, by virtue and in pursuance of a power reserved to him under his marriage settlement, was a good and valid lease. The power reserved was "to lease the premises for any term or terms of years, not exceeding 21 years *in possession*, and *not in reversion*, remainder or expectancy; reserving the best improved rent, &c." The *habendum* of the lease made, was in these words: "To hold to the said "*Elizabeth*, her executors, &c. *from the day of the date* of the "said indenture of lease for 21 years, &c."—At the trial of the issue at the *Summer* Assizes, 1777, for the county of *Salop*, several objections were made to the *form* of the issue; but all waved by consent; and a verdict was found for the plaintiff, subject to the opinion of the court upon the following facts: "That *Godolphin Edwards* being seised and in possession, executed the lease in the issue mentioned, and a counterpart "thereof was executed by the lessee; that the rent of 57*l.* reserved by the lease, was the most and best improved yearly "rent, that could be reasonably had for the premises: And that "the said lease was in every other respect made agreeable to the "power reserved to the said *Godolphin Edwards*, excepting in "the commencement of the term in the said lease mentioned." Upon which, the question submitted to the court was, Whether, the said lease, being made to commence *from the day of the date* thereof, the same is duly executed according to the terms of the above mentioned power?

1777.
PUGH *versus* Duke of LEEDS.

Mr. *Jones* for the plaintiff argued, 1st. That the power under which the leafe in queftion was made, being a power referved to the ancient dominion of the inheritance, it ought to receive a liberal conftruction; more efpecially, as the execution of it was for a *meritorious* confideration; *viz.* as a provifion for an only daughter. The precife form therefore need not be purfued; and fo it was exprefsly held in Lord *Darlington* verfus *Pultney*, *Eaft.* 15 *Geo.* 3. *B. R.** and the cafes there cited. 2. If fo, the variance between "from the date" and "from the day of the date," if it could be called a variance at all, was not fuch as ought to vitiate the leafe. In common parlance, they are the *fame* thing; and in *Co. Lit.* 46. *b.* and *Clayton*'s cafe, 5 *Rep.* 1. were exprefsly fo adjudged. Now it is not difputed that "from the date" is a good leafe in poffeffion. Befides, every fair intendment is to be made in favour of a deed for valuable confideration. The intention of the parties was clearly to make a leafe *in poffeffion.* If the words ufed, therefore, do not *neceffarily* exclude the day of the date, and create a reverfionary term, the court ought not to put a forced conftruction upon them. A reverfionary intereft is an intereft to commence after an intermediate intervening intereft, and fuch alone could have been intended to have been excepted in the prefent power. But there is no interval of intereft between the end of one day and the beginning of another; the law fays, there is *no fraction of a day;* and therefore in the cafe of a freehold leafe, rather than overturn the deed and defeat the intention of the parties, the court will prefume livery was made the laft moment of the day. 2 *Wilf.* 165. So here, to effectuate the intention, the court will prefume the leafe was *made* the *laft moment* of the day. As to the cafes determined lately in this court, they were determined on the authority of the Countefs of *Portland*'s cafe in the *Exchequer*; but there the court were equally divided; therefore it ought not to be confidered as a cafe of any great authority. The true rule to go by is, the *intention of the parties;* and here unqueftionably the intention was, to make a leafe *in poffeffion*, and therefore, *that* conftruction ought to prevail.

Mr. *T. Cowper*, *contra*, for the defendant, relied on the authorities of *Doe ex dim. Bayntun* verfus *Watton*, *Mich.* 15 *Geo.* 3.† *Doe ex dim. Gearing* v. *Shenton*, *Mich.* 16 *Geo.* 3. *B. R.* as decifive of the point. That the objection equally applied to chattel leafes under fuch powers, as to freehold. That the reafon why in law a freehold leafe to commence *in futuro*

* *Supra*, 260.

† *Supra*, 189.

futuro is bad, is because the freehold cannot be in abeyance. It was true, the court had sometimes avoided the objection in the case of freehold leases, by saying, that *till livery*, the freehold *remains* in the *grantor*; therefore, where livery has in fact been made at a future day, the court have adjudged the lease good: so, where the jury have *presumed livery* the last moment of the day. But these cases prove the objection to be good in general, that in chattel leases, the party is bound by the power; in freehold, by the law. If so, the present lease is clearly bad, for the court must intend it to be executed the day it bears date, and to take effect immediately; in which case, it is clearly a lease in reversion. The authorities of *Co. Lit.* 46. *b.* 1 *Bulstr.* 177. and 5 *Rep.* 1. are decisive, that "from the day of the date" is *exclusive*; and if one day might be excepted, twenty or a hundred might; and there is no drawing the line. Therefore this power is ill executed and the lease bad.

1777.

PUGH *versus* Duke of LEEDS.

Lord MANSFIELD.—The cases that have been determined here, went very much against my opinion and that of the court. But they were determined upon the authority of the Countess of *Portland*'s case, in the *Exchequer*, supposing the point to have been settled by that determination. But I have since had occasion to reconsider the question. I think the ground upon which it went, and the cases there cited, have been mistaken. It is very fit that a solemn judgment should be given upon a point that has been so much confounded.—The court ordered it to stand over.

Afterwards, on this day, being the last day of the Term, Lord *Mansfield* delivered the opinion of the court, as follows:

This case was an issue to try, Whether a lease made by one *Godolphin Edwards*, bearing date the 10th *October* 1765, was a good or bad lease. The case went down to trial, and several objections were raised; but they were all given up except one, which was this; that the lease was made for 21 years, to commence "*from* the *day* of *the date*." It arises on a marriage settlement, in the year 1724, by which a power is reserved to *Godolphin Edwards* to make leases, with many restrictions and qualifications, and among the rest the following; "that they "were not to be in reversion, remainder, or expectancy." And therefore the question is, "Whether this be a lease *in possession*?" And it turns upon this "Whether to commence *from* the "*day* of the *date* in this deed, is to be construed *inclusive*, or *ex*-"*clusive*, of the day it bears date?"

I will

1777

PUGH *versus* Duke of LEEDS.

I will first consider it as supposing this a *new* question; and that there never had existed any litigation concerning it. In that light, the whole will turn upon a point of construction of the particle "*from*." The power requires no precise form to describe the commencement of the lease; the law requires no *technical* form. All that is required is only enough to shew that it is a lease in possession, and not in reversion; and therefore, if the words used are sufficient for that purpose, the lease will be a good and valid lease.

In grammatical strictness, and in the nicest propriety of speech that the *English* language admits of, the sense of the word "*from*" must always *depend* upon the *context* and *subject matter*, whether it shall be construed *inclusive*, or *exclusive* of the *terminus a quo*: and whilst the gentlemen at the bar were arguing this case, a hundred instances and more occurred to me, both in verse and prose, where it is used both inclusively and exclusively. If the parties in the present case had added the word "inclusive," or "exclusive," the matter would have been very clear. If they had said, "from the day of the date *inclusive*," the term would have commenced immediately; if they had said, "from "the day of the date *exclusive*," it would have commenced the next day.

But let us see, whether the context and subject matter in this case do not shew, that the construction here should be *inclusive*, as demonstrably as if the word "inclusive" had been added. This is a lease made under a power; the lease refers to the power; and the power requires, that the lease should be a lease *in possession*. The validity of it depend upon its being in possession; and it is made as a provision for an only daughter. He must therefore *intend* to make a *good* lease. The expression then, compared with the circumstances, is as strong in respect of what his intention was, as if he had said in express words, "I mean it as a lease in possession."—"I mean it shall be so "construed."—If it *is* so construed, the word "*from*" must be *inclusive*. This construction is to support the deeds of parties, to give effect to their intention, and to protect property. The other is a subtlety to overturn property, and to defeat the intention of parties, without answering any one good end or purpose whatsoever. And though courts of justice are sometimes obliged to decide against the convenience, and even against the seeming right of *private* persons, yet it is always in favour of some greater *public* benefit. But here, to construe "from

"the

1777.

PUGH *versus* Duke of LEEDS.

" the day of the date" to be *exclusive*, can only be to defeat the intention of the parties. If such a construction were right, it would hold good, supposing the lessee had laid out ever so much money upon the estate; and all would be alike defeated by a mere blunder of the attorney, or his clerk. Therefore, if the case stood clear of every question or decision which has existed, it could not bear a moment's argument.

Secondly, I will consider this question upon the authorities.—I have arranged all the cases that have been determined in *Westminster-hall*, in order of time; and when I come to state them, you will be surprised to see they stand so little in the way, as *binding* authorities against justice, reason, and common sense. All they shew is, the great uncertainty of the meaning, and the impossibility of putting an absolute sense to hold good in all cases; they are themselves so many contradictions backwards and forwards.

The first case in point of time was in *Mich.* 4 *El. Dyer*, 218. *b.* *Moore*, 40. *S. C.* This was a question that arose upon the statute of Inrollments, 27 *H.* 8. *c.* 16; which says, " that " the inrollment shall be made *within six months next after* " *the date of the deed.*" The indenture in question bore *date* the 9th *October* 1557; it was *inrolled* in *Chancery* on the 21*st March* 1558, which was the *last* day of the six months, reckoning 28 days to each month; and making *the day of the date, exclusive.* The court held, " that the indenture was well " inrolled, and that the words " *next after* the *date* of the " deed," were exclusive of the *day* of the *date.*" This decision was *in favour* and in support of *the deed*; otherwise it would have been void. And yet it has been determined, that in a note of hand payable ten days *after sight*, the *day* of the *sight* is *inclusive* *. Why? Because of the subject matter; that there should be no further time to make the demand: and yet *after* the *day*, and *after sight*, is precisely the same in language.

The next case is *Clayton's* case, 5 *Coke*, 1. *Mich.* 27 *El.* The point in question was, the meaning of the words " from " henceforth," which were accounted from the day of the delivery, and as much as to say, " from the *making*:" But the court held, that " from the *making*" was *inclusive*, and " from " the *day* of the *making*" was *exclusive*.

The next is, *Trin.* 39 *Eliz.* 5 *Co.* 90. *Barwick's* case, which was a demise of a freehold lease by letters patent " *habendum* " *a die confectionis earundum literarum patentium*:" The *day* of the date was held to be *exclusive*, and the letters patent therefore void.

* Bellasis *v* Hester, 1 Ld. Raym. 281. 2 Lutw. 1589. S. C.

In

1777. Pugh versus Duke of Leeds.

In *Mich.* 4 *Jac. Cro. Jac.* 135, *Osborn* v. *Ryder*, "*from the* "*date*," was held to be, *inclusive;* and different from the time, or day of the date, which is exclusive.—In *Trin.* 8 *Jac. Cro. Jac.* 258. *Llewellyn* v. *Williams*, it was held, "that from the date" and "from the day of the date" meant *both* exactly the same thing, and *both exclusive* of the day.

The next case in order of time is *Trin.* 9 *Jac.* 1 *Bulst.* 177. the very year afterwards; and there it is said by *Fleming*, that "*from the date*," *includes* the day, and, "from the *day* of *the date*" *excludes* it. Now thus the cases stand, down to the 14th of *James:* They are *yes* and *no*, and a *medium between* them. But in *Trin.* 14 *Jac.* 1 *Rolle's Rep.* 387. 3 *Bulst.* 204. *S. C. Coke*, Chief Justice, and the whole court, in the case of *Bacon* versus *Waller*, held, agreeably to *Llewellyn*'s case, *Trin.* 8 *Jac.* that "from "the date," and "from the day of the date," meant *both* exactly the *same* thing, and *both* were *exclusive*.

Thus it stood then for *settled* law by these two *solemnly adjudged cases*, that *both* meant *exactly the same thing*. So it stood likewise at the time of the publication of *Coke's Commentary on Littleton*, which was about ten years afterwards; and so clear was Lord *Coke*, in his opinion, that the point was settled by those two judgments, that he adopts the judgment in positive words without restriction or qualification; and in *Co. Lit.* 46. *b.* he lays it down as text law, that *both* mean the *same* thing, and that both are *exclusive*. So it seems to have stood down to *Trin.* 24 *Car.* 1.—At that time mankind began to revolt at such a doctrine. There, in the case of *Cornish* v. *Cawsay*, *Aleyn*, 77. *Stile* 118. *S. C.* in an action of debt against an executrix, the plaintiff declared upon a lease, "from the day of the date" for seven years. The lease was in these words: "*From the day of the* "*date*" for the term of seven years, from *henceforth next* and *immediately following*, with a great many other words. It was contended, that though "*from the day of the date*" was *exclusive*, yet the words, "from henceforth, &c." being added, made it *inclusive:* and this was objected as a variance between the declaration and the deed. The court left it to the jury: The jury threw it back upon the court, and brought in a special verdict stating the lease *verbatim:* And then the court held, that according to the authorities, "*from the day of the date*" was *exclusive;* and therefore, the plaintiff had mistaken his lease. But at the same time they seemed shocked at its being so: For say the court, "if there was a question upon letters patent "like

"like *Barwick*'s cafe, to make the patent good, the jury might "find they were made the laft inftant of the day." This they obferved to get rid of the force of a wrong determination. Juft fo Sir *Eardly Wilmot* once did, in a cafe that came before him. He left it to the jury to find that livery was made the laft moment of the day.—The authorities therefore of *Coke Littleton*, 46. *b*. *Bacon* v. *Waller* *, and *Llewellyn* v. *Williams* †, were at that time grumbled at, as being againft the fenfe of mankind, againft convenience and againft juftice; and founded upon fubtleties that even the fchoolmen would have been afhamed of. The doctrine they eftablifhed was, that *both* meant the *fame* thing, and *both* were *exclufive*. With refpect to their *both* meaning the *fame* thing, unqueftionably they were right. For what is "the date?" The date is a memorandum of the *day* when the deed was delivered: In *Latin* it is "*datum*:" and "*datum* "*tali die*" is, *delivered on fuch a day*. Then in point of law, there is no fraction of a day: It is an indivifible point. What is "the *day* of the date?" It is "*the day the deed is delivered.*" "The date," therefore, being alfo defined to be the day the deed is delivered; "the date" and "the day of the date" muft be the *fame* thing. The *day* of the date, is only a fuperfluous expreffion. It is impoffible in common fenfe to diftinguifh the one from the other. "Date" does not mean the *hour* or the *minute*, but the *day* of delivery: And in law there is no fraction of a day. —As to the other point, that "from" fhall in all cafes be conftrued to be *exclufive*, it is contrary to the common fignification of language: And for courts of juftice to determine words againft the intention of parties, and againft the generally received fenfe and acceptation of the words themfelves, is laying a fnare to entrap mankind. Ufage decides upon the force of language; and with refpect to this word, has imprinted on the underftandings of men in general, in their tranfactions in life, the fenfe that I now put upon it: Whilft courts of law underftand it in a totally different fenfe.

1777. PUGH *verfus* Duke of LEEDS.

* 3 *Bulft.* 204. 1 *Rol. Rep.* 387. *S. C.*
† *Cro. Jac.* 258.

Thus it ftood down to the 6th year of *William* and *Mary*. A cafe then happened of confiderable property, and not merely a queftion of pleading‡. It arofe upon a prebendal leafe to commence, *from the date* of the indenture. The fucceffor wifhed to avoid it on the ground of its being a leafe to commence *in futuro*. The cafe was feveral times argued; *againft* the leafe, upon the weight of authorities; and in *favour* of it, upon the ground of the intention of the parties, "*ut res magis valeat*

‡ *Hatter* v. *Afh*, 3 *Lev.* 438. 1 *Ld. Raym.* 84. *S. C.*

"*quam*

Pugh *versus* Duke of Leeds.

"*quam pereat.*" After several arguments, *Treby*, Chief Justice, at first, from the strength of reason, was for supporting the lease; and then, staggered by the weight of authorities, changed his opinion: But when the judgment was given, he absented himself. *Powell* junior, at first followed the authorities; but afterwards came over to reason; and at last it was agreed, by *Neville* and the two *Powells*, that "from the date" ought to be construed *inclusive*, and therefore, that the lease was good. Now tho' there was something said in the argument as to the distinction between the date, and the day of the date, the authorities said they were the *same*; and yet this determination went to the matter of right in the question and supported the lease.

The next case after this was *Trin.* 11 *Wm.* 3. 1 Lord *Raym.* 480. It was upon a policy of insurance dated the 3d *September* 1697, upon the life of Sir *Robert Howard*, for a year, "from "the day of the date" of the policy. Sir *Robert* died upon the 3d of *September* 1698, at one o'clock in the morning: And *Holt* Chief Justice held, that *from the day of the date* was *exclusive*: But he held, that the insurer was liable, because in law there is no fraction of a day; and Sir *Robert* died at one o'clock in the morning, whereas to vacate the policy he should have lived till twelve o'clock at night. In that case there was no argument to be drawn from the *subject matter*; for in the policy it was totally indifferent when it should begin: The argument rather was, that it should begin the day after. In the next place it would have included the insurance if it had begun that day. Lord Chief Justice *Holt* seems to have considered it as a favourable case for the insured; otherwise he would not have had recourse to the old maxim of law, that there is *no fraction* of a *day*. He cited a case * where it was held, that if a man lived to the eve of the anniversary of his birth, no longer even than till one o'clock in the morning of that day, and made his will, by having touched the verge of the day, it was the same as if he had compleated the whole day; and the will was declared a good one. *That* existed as law; but *Holt* in his application of it turned it the other way. I look upon this case as of very little authority; there being no argument from the *subject matter*.

* 1 *Salk.* 44.

Another case happened since, in *Hil.* 4 *Ann. Seignorett* versus *Noguire*—2 Ld. *Raym.* 1241. This case, though a very material case, was not cited in the *Exchequer*, the present point not being the question litigated, but arising out of some collateral

matter;

matter; and therefore the indexes have not led counsel to it. It was upon a point of pleading; and the whole court held, that to aver that a contract was to commence "*with* the day "of the date," was the same thing as to aver that it commenced "*from* the day of the date." *Holt*, Chief Justice said, that "from "the date" was *inclusive*; and so, was the *same* as "*with* the "date," but that "from the *day* of the date" was *exclusive*." But *Powell* said, that "from the date," and "from the day of "the date," had been adjudged to be the same in the *Common Pleas*. That case in the *Common Pleas* is not to be found. It could not be the case of *Hatter* v. *Ash*. But all the court determined, that "*from* the *day* of the date" was the same as *with* the day of the date, and *inclusive*. If "from the *date*" therefore is *inclusive*, it must be the same as "from the *day* of the date." I have been supplied with another case this morning by Mr. Justice *Aston*: The name of it is *Thompson* v. *Vanbeck*, before Lord *Hardwicke* in *Mich.* 1736. It was an action brought upon an usurious contract, and the question turned upon a point of pleading. The rule laid down by Lord *Hardwicke* in that case shews that he went upon the same principle, and reasoned just as I do now; that "the construction must always depend upon "the subject matter."

N. B. Here, Mr. Justice *Aston* stated this case from his own note as follows: *Thompson* versus *Vanbeck* was never determined; but as it stood the case was this: It was an action on the statute of usury. The declaration said "giving day of payment "*from* the 26th." Upon the evidence it appeared, that the bond was given on the 27th. The question was, Whether, as the declaration stated "giving day of payment *from* the 26th," this was a variance? That depended upon whether the word "*from*" should be construed *inclusive* of the 26th, or *exclusive*. What Lord *Hardwicke* said was this: "The computation is to be made from "the time of the act done;" and though there are a variety of constructions of the word "*from*," yet it depends entirely upon the *nature of the thing*; and that it should so depend is the right rule. The consideration for the interest paid, is giving day of payment. I think it *includes* the day; and my reason is, that it would be a strange construction to say, that the day of payment shall be antecedent to the time of advancing the money; so *ut res magis valeat quam pereat*, it is *inclusive*. But the case was never decided.

Thus stood all the authorities down to the year 1743; a period of two hundred years; not much to the honour of the learned in *Westminster-hall*, to embarrass a point which a

plain

1777. plain man of common ſenſe and underſtanding would have no difficulty in conſtruing.

PUGH *verſus* Duke of LEEDS.

There then happened a caſe of great litigation in the *Exchequer*, which aroſe thus: Lord *Pembroke* had got a leaſe from the crown, of a ſpot of ground in *Privy Garden*, and had built a houſe upon it at a great expence. The Counteſs of *Portland* had alſo a leaſe of an adjoining ſpot, and had built her houſe next to Lord *Pembroke*'s. There was another houſe belonging to the Ducheſs of *Portland*, adjoining Lady *Portland*'s; all three held under the crown. Between the three houſes and the river *Thames*, there was a terrace, which had been part of the Queen's garden. Neither of them thought of applying for the terrace; and it would have been thought invidious to have done ſo. It was to be in common.—Upon the circumſtance of this terrace, Lord *Pembroke* laid out a conſiderable ſum of money upon his houſe. At the expiration, however, of her leaſe, the Counteſs of *Portland* applied to renew; a new leaſe of fifty years was granted, in which, without notice to Lord *Pembroke*, ſhe got the terrace inſerted and added. When Lord *Pembroke* heard of it he was much offended; but ſtill more ſo at the uſe that was made of it; for the Counteſs planted trees, which if they had grown up would have intercepted Lord *Pembroke's* view; however ſome fatality attended them, for they all died after a certain time. Lord *Pembroke* wanted to avoid this leaſe; not to take away Lady *Portland*'s houſe, but to get back the terrace, and leave it in the ſtate it was before. Application was accordingly made to the officers of the crown about it; and at laſt the Attorney General was directed to file an information for the terrace; and an information was accordingly filed in the *Exchequer*. A variety of objections were made to different flaws, ſuppoſed in the leaſe; but the principal objection was founded upon the civil liſt act, 1 *Ann. ſt.* 1. *c.* 7. which directs, that all leaſes to be granted of any of the crown lands ſhall be void, "unleſs made to commence "*from the date or making.*" This leaſe was made to commence "from the *day of the date* or making." Upon this it was argued for the crown, "that the *date*, and the *day* of the making "were *incluſive*, and that the act of parliament had expreſsly "declared the leaſe ſhould be in thoſe terms; but, that *from the* "*day of the date* was *excluſive*; and therefore, the leaſe was void "for the variance." On the part of the Counteſs it was contended, that "from the date," and "from the day of the date," were both the ſame. Upon the argument, all the caſes were cited that have been now cited, except the two I have mentioned.

Sir

Sir *Thomas Parker* and Mr. Baron *Reynolds* were of opinion, with the objection, that it was a void leafe, becaufe it commenced *in futuro*. The two other Barons were of a different opinion upon this point; but upon another point, they were of opinion the leafe was void. Sir *Thomas Parker* and Mr. Baron *Reynolds* to the contrary; fo that, for different reafons, they were all of opinion the leafe was *void*. Upon a cafe which happened in this court fince *, this cafe between Lord *Pembroke* and the Countefs of *Portland* was mentioned. Upon memory, as the judgment appeared to me in fo unfavourable a light, I took it for granted, that the court had been as it were compelled by the weight and force of authorities. But now I will tell you why I change my opinion, after having determined the cafe of *Doe* verfus *Watton*, as I then did, out of a great veneration for Sir *Thomas Parker*, and becaufe I did not care to fet up an opinion of my own mind againft a folemn judgment. Sir *Thomas Parker* intending to favour the world with the publication of fome cafes that were adjudged in his time, he did me the honour to defire I would perufe them. I have done fo; and reading a very elaborate report of the Countefs of *Portland's* cafe, brought back to me, in a regular view, the whole doctrine upon the prefent fubject. There I faw how the authorities ftood; how the reafoning ftood; and I likewife found another thing mentioned in that cafe, which feems to me not to have been properly argued at the bar by the counfel in fupport of the leafe. It is this: The parties concerned had fearched all the leafes from the time of the civil lift act, down to the moment of that, upon which the queftion was then in agitation; and they were nearly half the one way and half the other; eighty were granted "from "the date or making," and above feventy "from the day of the "date or making." All thefe leafes had paffed the great feal, and likewife the feal of the *Exchequer*. The argument drawn from this circumftance was, that ufage fhould get the better and prevail over the act of parliament; which was in fact an admiffion at the fame time by implication, that "from the day of "the date" was contrary to the act. It ftruck me in a different light; which is, that the queftion turned upon the conftruction of the *Englifh* words, and what fenfe they bore. If I was right, nothing can be fo ftrong as that all the officers of the crown who had been concerned in making thefe leafes looked upon the words as fynonimous, and fuffered them to pafs and repafs unnoticed. It is demonftration, that by ufing *both indifferently*, they underftood them to be *both* the *fame thing*.

* Doe *ex dim.* Bayntun *v.* Watton, *fupra*, 189.

1777.

Pugh *versus* Duke of Leeds.

I mentioned this to Sir *Thomas Parker*, and found my opinion supported by Sir *Eardly Wilmot*. Sir *Thomas Parker*, with that candour which always accompanies great abilities, gave ſo far way to it, that he had doubts upon the determination: He therefore ſuppreſſed the report of, The Attorney General *verſus* the Counteſs of *Portland*. And I would not have produced it upon this occaſion, but that he has given me leave to mention his name as approving of the preſent determination: This relieves me from the difficulty I ſhould have had in differing from his authority.

To conclude: The ground of the opinion and judgment which I now deliver is, that "*from*" may in the vulgar uſe, and even in the ſtrict propriety of language, mean either *incluſive* or *excluſive*: That the parties neceſſarily underſtood and uſed it in that ſenſe which made their deed effectual: That courts of juſtice are to conſtrue the words of parties ſo as to effectuate their deeds, and not to deſtroy them; more eſpecially where the words themſelves abſtractedly may admit of either meaning.

If there were nothing more in the queſtion, than that all the law officers concerned, had, in the abovementioned caſes, conſidered the two expreſſions as ſynonimous; that would be ſufficient to guide my opinion. Therefore let there be judgment for the plaintiff.

I ſhould ſay further, that inſtantly, upon what paſſed between Sir *Thomas Parker* and myſelf, I acquainted ſome of the counſel at the bar that there was a change of opinion, as to the authority of the caſe in the *Exchequer*.

THE END OF MICHAELMAS TERM.

HILARY TERM

18 GEORGE III. *B. R.* 1778.

REX *versus* BENJAMIN CHOLSEY.

Monday, Jan. 26th.

If an offender convicted in *B. R.* receive sentence to be *set on the pillory* in a *different* county; the *prosecutor* is not *bound* to pay the tipstaff any *fee* or even the *necessary expences* of carrying such offender thither.

THE defendant had been convicted of grofs perjury, before a committee of the Houfe of Commons, fitting upon the *Hindon* election; and when brought up for judgment in this court, was fentenced to be fet in the pillory at *Hindon*. A rule was thereupon made upon the marfhal to carry him down to *Hindon*, and upon the fheriff of *Wilts*, to fet him in the pillory. The tipftaff accordingly carried the defendant down; and having done fo, applied to Mr. *Beckford*, the profecutor, to be repaid his expences, and alfo for a compenfation for his trouble; the whole demand amounting to five guineas, which Mr. *Beckford* refufed to pay. A rule was therefore moved for and made upon him, "to fhew caufe why he fhould not forthwith pay "the faid *Holloway*, the tipftaff, his faid expences, &c."

Mr. *Dunning* now fhewed caufe, and infifted that the profecutor was in no refpect liable to this charge. That the proper mode was for the marfhal to receive the amount of the expences actually incurred, and the fee for the tipftaff's trouble, if he were entitled to any, from the fheriff of the county to which the defendant had been carried, and for the fheriff to reimburfe himfelf by charging the whole to the county.

Mr. *Wallace*, *contra*, in fupport of the rule, faid, it had always been the conftant practice, where perfons were pilloried in *Middlefex*, for the profecutor to bear all the charges attending the execution of the fentence; and there could be no reafon therefore why the profecutor fhould not in like manner defray the expences in this cafe.

 The

1778. Rex *versus* Cholsey.

The court were very clear that this charge could not be brought into the sheriff's account and allowed upon his cravings, as the expences of erecting the pillory, setting the criminal upon it, and such like expences disbursed by the sheriff himself, on his own account, are; and said, whatever the private practice of prosecutors might be, the case happened so seldom that no usage or custom could have obtained in it; and therefore, as there was no *established* fee or adjudged precedent in support of such a demand, they could not interfere to enforce the payment by a rule of court. But recommended it to the prosecutor to pay the money.—Mr. *Dunning* said, his client, Mr. *Beckford*, would have no objection, when it was no longer demanded as a right.

Same day.

Covenant. Practice.

PRICE *versus* FLETCHER *et al.*

IN this case, which was an action against the executors of Sir *John Astley*, for breach of covenant, for quiet enjoyment under a lease, the declaration set out the whole lease *verbatim*. Mr. *Bower* therefore moved that it might be referred to the Master to strike out the superfluous matter in the declaration with costs, agreeably to the rule laid down by the court, last term, in the case of *Dundass* v. Lord *Weymouth*, *supra*, 665. The court ordered it to be referred to the Master; and Lord *Mansfield* said, "the next instance of the kind that came before "the court, he would enquire who drew the declaration."

Tuesday, Jan. 27th.

Upon a rule *nisi* to vacate a *judgment confessed*, and to stay the proceedings on the *scire facias*, upon an allegation that the consideration upon which the warrant of attorney had been obtained, was usurious, the court will direct an issue to try the usury, and enlarge the rule in the mean time.

COOK *versus* JONES.

THIS came before the court upon a rule to shew cause why the judgment entered up on a warrant of attorney, given by the defendant in this case, should not be set aside, and why the proceedings on the *scire facias* should not be staid, upon this ground; that the consideration upon which the warrant of attorney had been obtained, was corrupt and usurious.

Mr. *Mansfield* against the rule.—This court will not interpose unless where the plaintiff would otherwise be entitled to sue out execution immediately. But here, the time being elapsed, no execution can issue till after judgment had upon the *scire facias*; to which, if warranted in fact, the defendant may in the mean time plead the usurious contract in bar.

Lord

Lord MANSFIELD.—The defendant can plead nothing in bar of the *scire facias*, which he might have pleaded to the original action. The judgment in this case is a judgment confessed on a warrant of attorney: so that the party had no opportunity of pleading, and is without relief unless the court interposes *.

The court ordered the rule to be enlarged, and an issue was directed to try, Whether the contract upon which the warrant of attorney was given, was usurious.

* See 2 *Str.* 1043. *Caf. temp. Hard.* 233. *Cro. Eliz.* 528. 1 *Sid.* 182.

REX *versus* JOHN HALE.

Saturday, Jan. 31st.

THE defendant had been convicted in *treble the value* of 520 lb. weight of *tea*, upon an information exhibited before two justices of peace, setting forth "that the said tea had been seized as forfeited, *for unlawful importation*, together with the packages, *&c.* and also a *cart* and *two horses* used in removing the same, *&c.*" for that "he the said *John Hale* did *knowingly harbour*, keep and conceal, and *permit* and suffer to "be *knowingly* harboured, kept and concealed, the said tea, *&c.* "so unlawfully imported, contrary to the form of the statute, "*&c.* †"—The cart and horses, and the tea, were also by the same conviction adjudged to be forfeited; but the penalty of *treble* the value of the tea, which amounted to 681 *l.* 7 *s.* 6 *d.* was mitigated to 190 *l.*

† 11 *Geo.* 1. *c.* 30. *f.* 15.

Upon the conviction being removed into this court by writ of *certiorari*, a rule was obtained to shew cause why the same should not be quashed, the justices having improperly proceeded to convict the defendant in *treble the value of the tea*, for *knowingly harbouring*, &c. without sufficient evidence to warrant them in so doing.—And now, upon shewing cause, the evidence appeared to be, "that the witnesses, in a field, about a quarter of a mile from the defendant's house, and which field they all swore they believed to be in the defendant's occupation, saw two of *his* servants loading the tea in question, into a cart with two horses, which one of the witnesses likewise swore were the *defendant's*. Another witness swore, that in a conversation with the defendant, he said "it was unfortunate for him, that his ser-"vants had taken his cart and horses without his knowlege;"—The defendant, upon being called upon to answer the charge, declared "*he knew nothing of his servants having the tea*;" but did not produce either of the said two servants who were concerned

1778. REX *versus* HALE.

in loading the said tea into the cart, or any other evidence whatsoever in proof thereof; nor did he prove that the duties chargeable upon the said tea, had been ever paid or secured, as by law they ought to have been.

Upon shewing cause against the above rule, so much of the conviction as related to the penalty of *treble the value* of the tea, was *quashed*; but the rest, as to the condemnation of the tea and the cart and horses, was adjudged good.

N. B. It seemed to be the opinion of Mr. *Davenport*, who was of counsel for the defendant, that a conviction could not be adjudged bad in part, and good for the rest. But for the benefit of his client, he consented to this mode of accommodating the dispute; and a rule was according made as above.

Same day.

DA COSTA *versus* JONES.

An action will not lie upon a *voluntary wager* between two *indifferent persons*, upon the *sex* of a *third*, apparently a *man*; having acted, and continuing to act, as such, in various public characters. 1. Because such enquiry tends, to *indecent evidence*. 2. Because it tends *to disturb the peace of the individual*, and *of society*.—But *indecency of evidence* is no *objection* to it's being received, where it is *necessary* to the *decision* of a *civil* or *criminal rights*.

THIS was an action of *assumpsit*, upon a wager between the plaintiff and the defendant, upon the sex of *Monsieur Le Chevalier D'Eon*; and who was so described in the declaration, which stated, that the defendant on the 4th of *October* 1771, in consideration that the plaintiff would then and there pay him *seventy-five guineas*, undertook to pay to the plaintiff *three hundred pounds*, *in case* the *Chevalier* should *at any time* prove to be a *female*.

There were other general counts for money lent, money laid out and expended for the use of the defendant, and money had and received by the defendant to the use of the plaintiff. Plea, *Non assumpsit*.—The cause was tried before Lord *Mansfield* at *Guildhall*, at the sittings after *Michaelmas* Term, 1777, when the jury found a verdict for the plaintiff, damages 300 *l.* costs 40 *s.*—Mr. *Bearcroft*, of counsel for the defendant, had moved on the second day of this term to *arrest the judgment*; and if he should not succeed in that, then that the defendant might be at liberty to *stay the proceedings*; and obtained a rule to shew cause. This motion was grounded upon an objection he took at the trial, that the plaintiff ought not to recover, because it was a wager upon a question tending to introduce indecent evidence. To this it was answered, that the objection, if founded at all, *appeared upon the record*; and Lord *Mansfield* being of that opinion, the objection was then over-ruled. Afterwards, on *Tuesday* the 27th of *January*, in this term, Lord *Mansfield* mentioned this case, and applying to Mr. *Bearcroft*, said, he under-

stood

1778.

DA COSTA *versus* JONES.

ſtood his *only* objection was, that the queſtion led to indecent evidence. But his Lordſhip added, "there is another ground, "which does not appear ſo ſtrong upon the record as upon the "evidence; which is, that it materially affects the intereſt of a "third perſon. If I am right in that objection, the plaintiff ought "to have been nonſuited. Therefore I mention it, that you may "move for a new trial at the ſame time, and ſo take in the whole "of the queſtion."— This addition was accordingly made to the rule.

Mr. *Wallace*, Mr. *Buller*, and Mr. *Dunning* now ſhewed cauſe, and argued, that by the law of *England*, wagers upon every poſſible ſubject are lawful, ſuch only accepted, as are ſpecially prohibited by poſitive ſtatute: *viz.* wagering policies upon ſhips, *&c.* intereſt or no intereſt, and ſuch as are made void by the ſtatutes againſt gaming. But even theſe were lawful antecedent to the ſtatutes that reſtrain them. Every other ſubject therefore, remains open to this ſpeices of contract, as it did at common law. And there, whether the parties were intereſted or not, was totally immaterial. But if it were material in this caſe, the parties certainly were intereſted from the moment of ſubſcribing to the policy. Any objection, however, to the legality of a wager is idle, when it is conſidered, that even courts of juſtice have adopted it as a form of legal proceeding, and try all feigned iſſues in that ſhape. The ſingle queſtion therefore, is, Whether the *ſex* of a perſon is an *improper* ſubject of a wager? And 1ſt, As to the objection, that it *tends* to introduce *indecent evidence:* No doubt, many ſuch wagers have exiſted. Inſurances upon the ſex of *children unborn*, are frequent. Maſter *Holford's* policy upon Lady *Lade's* child, if it had been brought to trial, would equally have led to indecent evidence; But no one ever thought it void, or objectionable on that account. In *pedigrees*, it is not uncommon for the ſame ſort of evidence to ariſe. Suppoſe a wager, whether a particular act was done by a *man* or a *woman;* or a *life inſurance*, with an exception as to a *particular diſeaſe;* the diſcuſſion of theſe, and many other ſubjects might involve the greateſt indecency. But courts of juſtice do not reject the contracts of parties, becauſe the ſubject matter of them happens to be indecent or indecorous. What can be a greater violation of all decorum, than for two ſons to run their fathers' lives againſt each other: And yet the caſe of the Earl of *March* v. *Pigot Trin.* 11 *Geo.* 3.* was entertained, and ſolemnly adjudged in this court, in favour of the contract, without

* Since reported, 5 *Burr.* 2,802.

1778. DA COSTA *verſus* JONES. * *Supra*, 37.

a thought or idea of its being liable to any ſuch objection. In the caſe of *Jones* v. *Randall*, *Hil.* 14 *Geo.* 3. *B. R.** which was a wager upon the event of a ſuit then depending, and part heard before the Houſe of Lords, the objection of its being *contra bonos mores* applied in the ſtrongeſt manner poſſible; becauſe the eſſential requiſite to the validity of a wager, namely, that there ſhould be an equal chance of winning or loſing, could only exiſt in that caſe upon the ſuppoſition, that the houſe were ſo ignorant as not to know the law, or, knowing it, were ſo profligate as to decide contrary to law. But the court were clear in over-ruling the objection, and confirmed the contract. Here, however, the objection is not even warranted by the fact. For the ſubject matter was not only *capable* of being proved, but *has been* proved in three ſucceſſive trials, *without* indecent evidence. The time to have objected would have been, when any ſuch evidence appeared; not becauſe it poſſibly *might* appear. There is nothing therefore in this objection; and if there were, it is in this caſe premature. 2dly, As to the poſſibility of its *affecting the intereſt of a third perſon*; that objection, perhaps, may hold, where the proceedings are merely fictitious or colluſive, and where they are ſet on foot for no other purpoſe than to injure a third perſon who is innocent; as in *Muilman*'s caſe †. But the ground upon which the court interferes in ſuch a caſe is, that the proceedings are a *contempt* of the court; and therefore, at the inſtance of the party liable to be injured, the court will ſtay them and puniſh the contempt. So, if this had been a mere contrivance to affect an innocent perſon, the court might have conſidered it as a contempt. But the caſes are totally different. This is a fair *bonâ fide* wager, made no leſs than *ten* years ago, without the ſmalleſt intention of affecting the *Chevalier D'Eon* in the ſlighteſt degree. The ſilence of the parties till this time, clearly ſhews *that*: And even now, the action would not have been brought to trial, but for the evidence furniſhed by the *Chevalier* herſelf in her diſpute with *Demorand*. But in what manner can it affect her? There is nothing criminal in having aſſumed the habit or the form and character of a man, and having fought the battles of her country or ſerved it as a miniſter of ſtate. But if it is criminal, the conſequences ariſing from it are the effect of her own conduct. She has impoſed upon the world by aſſuming a character that did not belong to her; and therefore ought not to be protected in con-

† Reported in Caſes *temp. Hardwicke*, 237.

tinuing

tinuing the cheat. So that, either way, the objection falls to the ground. And if the *Chevalier* could not avail herself of it, *a fortiori* the defendant, who is an indifferent person, cannot. But is it not every day's practice for *third* persons to be affected, and very materially so, by trials in the common and ordinary course of justice? What could be more painful to a father, than to have a wager upon his own life laid by his son, publicly canvassed and discussed in a court of justice? A wager was lately tried upon the place of nativity of the Duchess of *Hamilton* and her sister, whether it was in *England* or *Ireland*; which produced an enquiry that ascertained their ages: A very serious inconvenience probably to them, but it would have been no ground for staying the regular proceedings of a court of justice. But here the objection itself fails, because all the public characters which the *Chevalier* has filled, are past. As there is no substantial objection therefore, either upon principle or authority, nor any founded in fact, to bar the plaintiff's right of action in this case, the verdict ought to stand, and the rule be discharged.

1778.

DA COSTA *versus* JONES.

Mr. *Bearcroft* and Mr. *T. Cowper*, *contra*, in support of the rule.—There is sufficient foundation for staying the proceedings upon both objections; and the ground is this: that to permit such a wager to be discussed in a court of justice, is *contra bonos mores*. 1. It tends to introduce indecent evidence, where it is not necessary for the purpose either of civil or criminal justice, upon a question in which the parties have no interest whatever but of their own creating. 2. It tends to violate the peace of society by exhibiting a *third* person, who is innocent, in a ridiculous and contemptible light to all the world, and to break in upon his private comfort and peace of mind. Wagers of this kind are in themselves a national disgrace. Ought it to be endured in any country, that two persons shall lay a wager upon an indecent subject, and then call upon the highest court of justice in the kingdom to determine so improper a question? To obviate this objection it has been said, that in point of fact no indecent evidence was given in this case: But that is not strictly so. The trial certainly was, and in the nature of it could not but be, indecent. And it is upon *that* the objection turns: Not, Whether the language of the witnesses, or the mode of conducting the trial, was indecent; but, Whether the nature of the subject was such, that the most guarded caution and wariness in the mode of expression, could not prevent indecent ideas from arising *out* of the cause? Where the purposes of public justice require that in-

decent

1778. decent evidence ſhould be given, as upon an indictment for a rape, the court muſt of neceſſity ſubmit to the inconvenience; otherwiſe crimes would go unpuniſhed, and offenders eſcape. So, if neceſſary to the deciſion of private wrongs, or to the rights of individuals. Mr. Juſtice *Burnet* therefore was clearly wrong, (and it is not diſputed that he was ſo,) in refuſing to try the action of defamation before him, in which a woman charged a man with having proclaimed to the world that ſhe had a defect in a particular part of her body. The defendant by way of plea juſtified, averring that it was true ſhe had ſuch a defect. When the cauſe was called on, Mr. Juſtice *Burnet* threw the record out of court. But the plaintiff was an injured perſon: Therefore he certainly ought to have entertained the ſuit.—Suppoſe a queſtion were to ariſe upon the right of inheritance of an *hermaphrodite*, who, Lord *Coke* ſays, "ſhall be heir, either as *male* or *female*, according to that ſex which prevails*." For the ſake of private juſtice it would be neceſſary to hear and decide upon the fact. So, in the caſe of a particular diſeaſe excepted out of a policy for life. But not, if it were a mere voluntary wager, whether ſuch a perſon were an hermaphrodite, or had a particular diſorder. No more would the court tolerate a wager, as to the cauſe why a married woman did not breed. And numberleſs other inſtances might be put. So palpable is the objection, that it is impoſſible to illuſtrate it by particular caſes without falling into indecency. 2. It affects the peace and comfort of a third perſon, and, as ſuch, the peace of ſociety. The caſes to which this has been compared, bear no ſimilitude to it. There is no ridicule attending a wager upon the ſex of an unborn child. In the caſe of the Earl of *March* verſus *Pigott*, the reproach did not fall upon thoſe who were the ſubject of the wager, but upon the parties themſelves who laid it.—*Jones* v. *Randal* was a hedging wager by a party who was intereſted; it reflected on nobody: The event was quite uncertain; and the court determined that there was no objection to it, either in morality or policy. (Lord *Mansfield*.—Never was a queſtion more doubtful how it would be decided till it was actually determined.) But in this caſe, the intereſt of *D'Eon*, as well as his private feelings, are moſt materially affected. By the inveſtigation of his ſex he may be expoſed to ridicule and contempt: And if, as was aſſumed in the argument, it goes to prove him an impoſtor, it is adding infamy to ridicule. It can never be, that mere volunteers in a wager ſhall be permitted wantonly to expoſe to the public view every

DA COSTA *verſus* JONES.

* Co. Litt. 8. a. 29. b.

every defect and imperfection of those they think fit to select for the purpose; and, in aid of the enquiry, disturb the peace of whole families, by calling confidential friends, professional attendants, near relations and necessary attendants to give testimony of the fact.—Therefore, upon principles of justice, the court will now do what ought to have been done at the trial, and allow the objection.

Lord Mansfield.—This case, upon the trial of the first cause, made a great noise all over *Europe*: And soon afterwards I own I was sorry, that the answer given to the objection made at the trial, "that it appeared upon the record," had been so hastily given way to by me. I was sorry that the nature of the action had not been more fully considered. I was sorry for another thing; that the witnesses who were *subpœnaed* had not been told they might refuse to give evidence if they pleased. But no objection was made on their behalf by the counsel for the defendant, nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them were confidential persons, servants, and others employed in the way of their profession and business. Had any of them demurred, it would have opened the nature of the action. That two men by laying a wager concerning a third person, might compel his physicians, relations, and servants, to disclose what they knew relative to the subject matter of that wager, would have been an alarming proposition: the bare stating it would have startled. Indeed, the objection being put upon the general crude ground of the cause leading to indecent evidence, and not upon the special nature of this case, did not strike me. For indecency of evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right: And upon that ground, we think Mr. Justice *Burnet* did wrong, in rejecting the case that came before him; for there, the party had received an injury. But if it had been an action upon a *wager*, Whether such a woman had such a defect or infirmity? it would have been nearly the present case. Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular acts of parliament: And the restraints imposed in particular cases, support the general rule. For where parliament interposes and says, "unless you have an interest in such a case, any wager or insurance upon it shall be void and of no effect;" it implies, that in cases not specially prohibited

1778. prohibited by act of parliament, parties may wager or insure at pleasure. And this species of contract has, in fact, gone to an extent that is much to be complained of. Whether it would not have been better policy to have treated all wagers originally as *gaming contracts*, and so have held them void, is now too late to discuss: They have too long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a court of justice. Suppose a wager between two people, that one of *them*, or that a *third* person, shall do a criminal act. To go from stronger cases to those that are less strong. "I lay you a wager you do not beat such a person. "You lay that you will." Such a wager would be void: Because it is an incitement to a *breach of the peace*. Suppose the subject matter of a wager were a violation of chastity, or an immoral action: "I lay I seduce such a woman." Would a court of justice entertain an action upon such a wager? Most clearly not; because it is an incitement to *immorality*. Suppose a wager upon a subject *contra bonos mores*, like the case of Sir *Charles Sedley*; Would a court of justice try a wager that incites to such indecency? It may be said, there are no adjudged cases; but you offend; you misbehave by laying such a wager. To come nearer to the point: Suppose a wager that affects the interest or the feelings of a third person; which is one of the grounds upon which the motion for a new trial in this case has been argued. For instance: That such a woman has committed *adultery*. Would a court of justice try the adultery in an action upon such a wager? Or, a wager that an unmarried woman has had a bastard. Would you try that? Would it be endured? Most unquestionably it would not. Because it is not only an injury to a third person, but it disturbs the peace of society; and in either of these two last cases, the party to be affected by it would have a right to say, How dare you bring my name in question? If a *husband* complains of adultery, *He* shall be allowed to try it; because he is a party injured. So, if it be *necessary to justice*, to try whether such a one is a bastard; it shall be tried. But third persons, merely for the purpose of laying a wager, shall not thus wantonly expose others to ridicule, and libel them under the form of an action.

DA COSTA *versus* JONES.

We then come to the present case, which is shortly this: Here is a person who appears to all the world to be a man; is

stated

1778.

DA COSTA *versus* JONES.

stated upon the record to be "*Monsieur Le Chevalier D'Eon*;" has acted in that character in a variety of capacities; and has his reasons and advantages in so appearing. Shall two indifferent people, by a wager between themselves, injure him so, as to try in an action upon that wager, Whether (as was said in the argument) he is a cheat and impostor? or, shew that he is a woman, and be allowed to *subpœna* all his intimate friends, and confidential attendants, to give evidence that will expose him all over *Europe*? It is monstrous to state. It is a disgrace to judicature. And if the *Chevalier*, by application to the court or otherwise, had come and said, "here is a villainous wager laid to injure me; "I pray the court, as a third person whose interest it affects, to "stop it;" the court would instantly have done it: Upon the same principle as the court stayed the proceedings, upon the application of Mr. *Muilman*, in the case of *Coxe* v. *Phillips**. Wherever a question arises upon a real matter of right, though the interest of third persons, not parties, may be affected by it, it shall be tried.—If a witness lays a wager upon the subject matter in dispute between a third person, it does not affect his evidence so as to defeat either party of it.

* *Cas. temp. Hardwicke*, 237.

I think the other ground is material. The question is upon the sex of a person, to the appearance of all the world, a man; and who, for reasons of his own, thinks proper to keep his sex a secret. The medium of proof upon such a question must arise from the circumstances that distinguish the sexes. This necessarily tends to introduce all the indecent evidence such an enquiry can involve. Suppose two persons were to lay a wager upon a mark or defect in a woman's body. Will the court say they would suffer her chambermaid to be called, to give evidence upon such a question.—The case mentioned in the argument, of an insurance by two sons upon the lives of their respective fathers, and other cases, where the life of one person is run against another, are not cases that injure or affect the individuals who happen to be made the subject of such wagers They are no reflection or injury to them. So, a wager whether the next child shall be a boy or a girl, hurts no one. But the present case is indecent in itself, and manifestly a gross injury to a third person; therefore, ought not to be endured. We think the objection appears sufficiently upon the record, and that there is ground enough upon these allegations to arrest the judgment.

The three other judges concurred.

Per cur. Rule for arresting the judgment absolute.

1778.

Same day.

A policy upon the *sex* of a person, is a *wagering* policy within the stat. 14 *Geo.* 3. *c.* 48.

ROEBUCK *et al. versus* HAMMERTON.

THIS was an action upon another wager in the form of a policy on the same subject as the preceding case, with this difference only; that it was made *subsequent* to the stat. 14 *Geo.* 3. *c.* 48. by which, "all insurances upon *lives*, or "any *other event* or events, *without interest* in the parties, are "made null and *void*." The question reserved therefore at the trial, was, Whether this were a policy within the act; and if the court should be of opinion that it was, then a nonsuit was to be entered. Mr. *Buller* accordingly moved the *second* day of this term, that the verdict given for the plaintiff might be vacated, and that a judgment of nonsuit might be entered instead; and for leave to move in arrest of judgment, and to stay the proceedings if his first motion did not succeed.—Lord *Mansfield*, after delivering his opinion in *Da Costa* versus *Jones*, "that the objection sufficiently appeared upon the re-"cord," said, "*that* made it unnecessary to go into the ques-"tion, Whether this were a policy within the above statute; "therefore, a nonsuit ought to be entered." But the counsel for the plaintiffs, on account of the *costs*, praying to be heard upon it, the court permitted them to enter into the argument. They insisted that the statute did not extend to this case; that it was not only not a policy, but the subject matter itself was incapable of insurance; and that the nature of the act, not the form of the instrument, ought to decide. But this was a mere *wager reduced into writing*, not upon any *future* contingency, but upon a fact *then existing*; and therefore, to construe it a policy within the meaning of the statute, would be to extend the act to all wagers, where the parties for greater security might think proper to reduce them into writing. Lord *Mansfield* stopped the counsel for the defendant, saying, it was too clear to give themselves any trouble. The parties themselves have called it a policy, it is indorsed a policy, opened as a policy; and any number of persons whatever might have subscribed it as such. Therefore it is clearly within the act; and a nonsuit ought to be entered.

Per cur. Let a nonsuit be entered.

1778.

KNIGHT *versus* BATE.

Aston, Justice, absent.

Tuesday, *Feb.* 3d.

If a statute for allotting waste lands within a manor, direct all disputed claims to be tried by a feigned issue, and *limit* the time of *bringing* such action, to six *months*; an action brought against a copyholder *within time*, if *abated* by his death, must be *revived* against the *heir*, *within six months* after the plaintiff has *notice of the descent*, tho' the heir be *not admitted* till long after that time.

THIS was an issue to try whether the defendant, as owner of a certain messuage and lands, was entitled to an allotment of land upon *Broadwaters Common*, in the county of *Worcester*.——The defendant pleaded a private act of parliament, 15 *Geo.* 3. *c.* 25. for dividing and allotting the common and waste lands in the manor and parish of *Wolverley* in the county of *Worcester*; by which act, commissioners are appointed for ascertaining claims; and that by a clause in the act it is provided, that if their award is made in *November*, *December*, *January*, *February*, or *March*, any person dissatisfied with such determination, may bring their action in the form of a feigned issue within six months, and try their claims at the 1st, 2d, or 3d assizes next after such determination: And in case of no such action brought, commenced, or proceeded in within the times aforesaid, then, such order of the commissioners is to be final. That the defendant's father was entitled to a copyhold, and claimed a share of common in respect of such his copyhold estate. That a dispute arose between him and the plaintiff touching his right; and that the commissioners upon examination of witnesses awarded in favour of him on the 12th *August* 1775. That on the 8th of *November* 1775, a *latitat* was taken out by the plaintiff to try the right. That on the 29th of *November* 1775, *Bate*, the father, died: Upon whose death the writ abated. That the copyhold estate descended to the defendant, and he entered as heir at law to his father, of which the plaintiff had *notice*. That the plaintiff did not within six months after the award, or within six months after he had notice of the death of the said *Bate*, the father, and of the premises descending to the defendant, commence his action and try it within three assises.—The plaintiff replied (*protesting* he had *no notice* of the descent to the defendant, protesting also that the defendant wilfully neglected being admitted tenant of the copyhold) that the defendant was *not admitted* tenant of the estate till the 10th of *October* 1776, and that the plaintiff did, within six months after he was so admitted, commence his action. Demurrer; and joinder in demurrer.

Mr. *Leycester*, for the defendant, stated the question to be, Whether the action was commenced within time? which, he said, depended upon whether the six months limited by the

1778. ſtatute were to be computed from the time of the *anceſtor's death*, or from the time of the *heir's admittance*; and he contended they ought to be computed from the death of the anceſtor. He ſaid, it was clearly ſettled, that an heir upon whom a copyhold deſcends, is as perfect tenant, and as compleatly in poſſeſſion of the land, as to all *ſtrangers*, by the deſcent, as if he were in by admittance. *Co. Comp. Cop. ſect.* 41. He may enter, take the profits, and maintain treſpaſs. *Simpſon* verſus *Gillion*, *Noy*, 172. *Clark* v. *Pennifather*, 4 *Co.* 23. S. P. He may bring ejectment or alien. *Rumſey* verſus *Eves*, 1 *Leon.* 100. In a word, he is liable to all duties, and entitled to all advantages, as well before as after admittance; which is only a matter between him and the lord to entitle the lord to his fine; but as to all other perſons, it is indifferent.—As to the proteſtation of the plaintiff that he had no notice of the deſcent, actual notice is in no caſe neceſſary. The *entry* and *poſſeſſion* of the tenant are acts of ſufficient notoriety in copyhold as well as in freehold caſes, to make it incumbent upon all perſons concerned, to *take* notice; and indeed more ſo than admittance itſelf: becauſe, that is only a private ceremony at the lord's court. But, *ſecondly*, ſuppoſing admittance neceſſary, ſtill the action in this caſe is not brought in time; for as the writ abated by the death of the anceſtor, the plaintiff ſhould immediately, upon the admiſſion of the defendant, have continued it by *Journey's accounts*, and purſued it with due diligence. *Spencer's* caſe, 6 *Co.* 10. *Winch.* 82. 1 *Lutw.* 287. 1 Ld. *Raym.* 283. *Wilcox* v. *Huggins*, 2 *Str.* 907. *Fitz. Gib.* 170. S. C. The general rule laid down by all theſe authorities is, that wherever a ſuit is continued by *Journey's accounts*, it muſt be done *recently*, and within a reaſonable time. But in this caſe, the plaintiff has not uſed due diligence; and though particular circumſtances may excuſe, yet as the plaintiff muſt have been fully prepared, (having before brought his action againſt the defendant's father,) there can be no ſpecial reaſon aſſigned to juſtify his delay, which has been injurious to all parties; and therefore the defendant ought to have judgment.

KNIGHT *verſus* BATE.

Mr. *Bower*, *contra*, for the plaintiff, ſtated, that the plaintiff had ſued out writs againſt three other defendants in three ſeveral actions, depending preciſely upon the ſame queſtion as the action brought againſt the defendant's anceſtor. That in the firſt of theſe three cauſes, a verdict at the trial paſſed for the plaintiff; upon which, a verdict by conſent was taken for him in the other two; and *that* probably would have been the caſe

in the action against the defendant's ancestor, if it had not been abated by his death; the right being fully determined by the verdict in the *first* cause. Therefore, the justice of the case was clearly with the plaintiff.—As to the questions arising upon the demurrer, he insisted, that the position laid down by Mr. *Leycester*, that the heir of a copyholder is tenant to all intents before admittance, was by no means established by Lord *Coke* in the latitude contended for. So far he was ready to admit, that the heir is considered as *tenant* against all *wrong-doers*: but *that* is from the *necessity* of the case; because the title must be in *somebody*, and it clearly is not in the *lord*. So, in some cases he may *alien* before admittance; because it may be uncertain when a court will be held. But if he wilfully neglect to be admitted, he shall not; and so it was expressly agreed in 1 *Leon.* 100. That case is also in point to shew, that a stranger is not bound to take notice of the heir as tenant before admittance. But here most clearly he could not; because this action must be brought against the *owner*, not against the *occupier*; therefore, till admittance, a stranger could not know against whom to bring it. If the defendant meant that third persons should be bound by his title, he should have furnished them with proper evidence of it. Instead of which it stands confessed by the demurrer, that he wilfully neglected to be admitted. He alone then has prevented the action from being brought sooner; and therefore ought not to be permitted now to avail himself of his own wrong. - As to the second question, Whether the action was brought in time, *after* the admittance of the defendant? he said, the doctrine of *Journey's accounts* was inapplicable to this case, except by analogy to shew that the second writ ought to be sued out in a *reasonable* time. As to that, in *Spencer*'s case*, it is said "to be entirely "in the discretion of the court;" and by the authorities, it is clear the time allowed has been often varied. In the case cited from 1 Ld. *Raym.* 283. it is said, that "formerly *half a year* "was allowed." In *Gifford* versus *Young*, 1 *Lut.* 297, the reporter says, "there was no judgment, because the court were "divided, whether *four months* between the death of the defendant and the purchase of the second writ, was a reasonable "time." In *Sir Thomas Finch* v. *Lambe*, *Cro. Car.* 294. a new original was brought *a year* after reversal of the outlawry, and adjudged good. And in the *Year-book*, 6 *Ed.* 3. 32. *b. six months* was said (*arguendo*) to be soon enough, and not denied.

* 6 Co. 10.

1778. Lord MANSFIELD.—It is averred in the plea, that the plaintiff had notice of the estate having descended to the defendant as heir at law; that he had entered, and that he was in possession; in short, of every thing necessary to enable the plaintiff to have revived his suit in due time.

KNIGHT *versus* BATE.

Mr. *Bower*. We could not take issue upon two facts. We were obliged to give up one. We admit the defendant was in possession, but we say he negligently refused to be admitted.

Lord MANSFIELD.—It is absolutely averred, that you had *notice* of the entry and possession of the defendant; and you might have taken issue upon the notice. The prejudice you have raised in our minds in this case is, from what you have stated *out* of the record, which we cannot take notice of upon this argument; nor do I well see how we can get at it. If the defendant's father in his life-time had made any engagement to abide by the event of the other causes, or if on the trial of the other actions, the defendant himself had said, he would not be at the trouble of trying the question over again, and by that means had induced the plaintiff to lie by, the court might get at it by a collateral motion. But no such circumstances appear. Therefore laying all that you have suggested out of the case, Where is the doubt? The statute says, the action is to be brought within six months and upon a feigned issue. An action is brought within six months; but by the death of the defendant the suit is abated. Surely it can never admit of a question where the original action is to be brought within *six* months, whether the *revival* of the suit may be delayed for a whole *twelvemonth*? There might be a doubt, whether the plaintiff ought not to have six months from the time of the abatement of the suit? but there is no pretence for more.—The admittance is entirely out of the question, being a matter only between the lord and tenant. What impediment was there, after notice of the descent, to hinder the right from being tried in a feigned issue before admittance?—Therefore let there be judgment for the defendant.

Per. Cur. Judgment for the defendant.

Ex parte COTTRELL in the matter of EAVES, a Bankrupt.

Same day.

THIS was a case out of *Chancery* for the opinion of this court, stating in substance as follows:—*Catharine Essex, single woman*, on or about the 25th *June* 1766, went to live with, and was hired by *Richard Eaves*, then or late of *Sarehole* in the parish of *Yardley* in the county of *Worcester, innholder*, dealer and chapman, to serve him from that day for the space of one year. And the said *Richard Eaves* was to pay the said *Catharine Essex* 5*l.* 5*s.* for such service. After the said *Catherine Essex* had lived with the said *Richard Eaves* for about five months, the said *Richard Eaves*, by promising frequently to marry her, prevailed on her to permit him to have *carnal knowledge* of her: And she continued in his service for eight years from the said 25th of *June* 1766; and during that time had *two children* by him, one of which died soon after it was born, and the other is now living. And she never received any wages whatever from the said *Richard Eaves* for such service, though she often requested him to pay her; and he as often *promised* to pay her. That, in or about the month of *June* 1774, the said *Richard Eaves* being upon the point of marriage with a person of large fortune, and wanting to remove the said *Catherine Essex* and the child from him, the said *Richard Eaves*, with the consent of the said *Catherine Essex*, intimated his wish to *Joseph Cottrell*, of *Sparke Brooke*, in the parish of *Yardley*, in the county of *Worcester*, blacksmith, and treated with him to marry her; and *promised* that *if he would marry her, and settle a freehold house and land* at *Yardley* aforesaid, which he was seised of in fee, of the yearly rent of 15*l.* and upwards, *upon* the said *Catherine Essex for her life, and take care of the child*, the said *Richard Eaves* would *give* the said *Joseph Cottrell* 42*l.* for the said *Catherine Essex*'s eight years' wages, and *a bond* for the payment of 400*l.* by installments.

That accordingly, by lease and release of the 23d and 24th *June* 1774, *Cottrell*, in *consideration* of the intended *marriage*, settled the premises upon himself for life, remainder to the said *Catherine Essex for life*, remainder to the issue of the marriage, &c. That on the 25th *June* 1774, *Richard Eaves*, for the *considerations* aforesaid, and in *pursuance of the agreement* between him and *Cottrell*, entered into a bond in the penal sum of 800*l.*

 conditioned

1778. conditioned for the payment of 400*l.* to the plaintiff by inſtallments. That on the 29th of *September* 1774, *Joſeph Cottrell* was *married* to the ſaid *Catherine Eſſex* his preſent wife, and has ever ſince *maintained* the ſaid *child.* That on the 6th of *March* 1775, before any payment on the bond became due, *Eaves* was declared a bankrupt.—The queſtions were, 1ſt, Whether under all the circumſtances of the caſe, *Joſeph Cottrell* was entitled to come in as a creditor under the commiſſion of bankrupt againſt *Eaves*? 2dly, Whether the ſaid *Joſeph Cottrell* would be barred from recovering the money ſecured by the ſaid bond, in caſe the bankrupt ſhould obtain his certificate?

Ex parte COTTRELL.

Mr. *Wilſon* for the plaintiff had begun to argue, but Lord *Mansfield* interrupted him, inquiring what could be objected to the bond?

Mr. *Chambre, contra*, ſaid, the objection to the bond was, that it was *not* within the ſtat. 7 *Geo.* 1. not being founded on a *bonâ fide* and *good* conſideration.

Lord MANSFIELD.—It is a good conſideration *between the parties.* It is a ſtipulation between them in conſideration of marriage: The one has performed his part, and married the woman; the other is therefore bound to perform his. There is no ground to impute any fraud in the caſe.

Afterwards, on *February* 10th, in this term, the court certified in theſe words:

Anſwer to the firſt *quære.*	Having heard counſel on both ſides and conſidered this caſe, we are of opinion that the petitioner *Joſeph Cottrell* is entitled to come in as a creditor under the commiſſion of bankruptcy iſſued againſt *Richard Eaves.*
To the ſecond *quære.*	We are of opinion that he will be barred.

Mansfield,
R. Aſton,
E. Willes,
W. H. Aſhhurſt.

1778.

Thursday, Feb. 5th.

HARRINGTON, *qui tam, versus* JOHNSON.

In a *qui tam* action for insuring tickets contrary to stat. 16 *Geo.* 3. *c.* 34. the court will not stay the proceedings upon an affidavit of the defendant, that a *former action* had been brought against him in *C. B.* for the *same offence*, in which he had leave to *compound*: But, he must *plead* such matter specially.

MR. *Wallace* had obtained a rule for staying the proceedings in this case, which was an action against the defendant for insuring lottery tickets contrary to the stat. 16 *Geo.* 3. *c.* 34. The application for the rule was founded upon an affidavit made by the defendant, stating that a *former action* had been brought against him in the *Common Pleas*, for the *same offence*, at the suit of one *Wood*, in which the court had given him leave to compound*.

Mr. *Bearcroft* now shewed cause, and contended, that the affidavit of the defendant, stating only *generally* that this action was for the *same offence* as that in the *C. B.* was not sufficient. That it ought to have specified the particular insurance which made the subject matter of the former action; either by shewing the numbers of the tickets, or for whom insured, and when; which would have been the means of satisfying the court that the offences really were the same. At least, the application should have been supported by other affidavits. Being deficient in both those circumstances, the proper and only mode of relief was, to *plead* the former action and leave of the court to compound, if it were warranted by the truth of the case.

Mr. *Wallace*, *contra*, in support of the rule said, the offence was *keeping an office* for the insurance of tickets; *not* the act of *insuring*; for *that* is only *evidence* of the *keeping*: And that there could be but *one* offence of *keeping*, attended with *one* penalty. Consequently, there was no necessity for the defendant to state any thing more, than that he had already been prosecuted for the same offence. As to pleading the former action and the leave of the court to compound, he said, there never was an instance of the kind.—But the court were clearly of opinion, that this matter ought to be specially pleaded: And accordingly directed the rule for staying the proceedings to be discharged.

* *Vide* this case, 2 *Black. Rep.* 1157.

1778.

Friday, Feb. 6th.

HANKEY *et al.* *versus* JONES.

Merely *drawing* bills on a person's *own account*, at the expence of paying a quarter *per cent. commission*, besides interest at 5 *per cent.* for their being discounted, and borrowing *accommodation notes* in exchange for his own to the same amount, will not make a man an *object* of the *bankrupt laws.*

THIS was an issue directed by the Court of *Chancery*, to try whether the defendant was a bankrupt, and also the validity of the petitioning creditor's debt: At the trial before Lord *Mansfield* at *Guildhall*, at the sittings after *Michaelmas* Term 1777, the jury found a verdict for the plaintiff on the *second* issue, damages 1*s.* costs 40*s.* and also a verdict for the plaintiff on the *first* issue, damages 1*s.* subject to the opinion of the court on the following case:—That the defendant, a *clergyman*, being possessed of lands in the Isle of *Ely*, and engaged in expensive works of cultivating and draining such lands; to raise money for that purpose and his other occasions, did before the year 1774, but more particularly in the years 1774, 1775, and 1776, *draw* bills, very many in number and to a very large amount in value, which were accepted by different persons. That the defendant, in order to provide money for the payment of the said bills, sent cash and other remittances to the acceptors, and *allowed* to some of his bankers a *quarter per cent.* for paying his bills, and also in many instances *paid* a *quarter per cent.* to the persons who got them discounted, besides interest at 5 *l. per cent.* The defendant also *borrowed accommodation bills* to a large value, in lieu of which he gave his own bills or notes to the same amount. He discharged all his bills and notes punctually till about the month of *April* 1777.—The question for the opinion of the court was, Whether this were a *trading* within the true intent and meaning of the bankrupt laws? If it were a trading, then a verdict to be entered for the plaintiff on the first issue. If it were not a trading, then a verdict to be entered for the defendant on that issue.

Mr. *Douglas* for the plaintiff, stated that at the trial *two* objections were made to the validity of the commission; 1st, That the defendant was a *clergyman* in priest's orders; and the clergy being prohibited by law from *using any manner of merchandize* *, the defendant could not legally be said to be an object of the bankrupt laws: But this objection he said was now abandoned. He should therefore confine himself to the second question, Whether the defendant, by engaging in a course of transactions such as were stated in the case reserved, had rendered himself an object of the bankrupt laws? That is, Whether he came under the

* *Stat.* 21 *H.* 8. *c.* 13. *sect.* 5.

the description of "a person *using or exercising the trade of mer-* "*chandize?*" for he should not contend that he fell within the other branch of the several statutes that describe bankrupts*, namely, of a person "seeking his trade of living by buying and "selling."—He said if the words of the statute were sufficiently explicit in themselves, so as not to admit of a doubt what transactions came within the description of using the trade of merchandize, he could not go out of the act of parliament for a construction of them: but that was not the case; the words "or "otherwise" leaving the subject open to great latitude. He conceived therefore the question might properly be considered as a question of the *lex mercatoria*; and he argued, that the law of merchants making part of the common law of *England*, the mode of determination in this case must be by the same *media*. These, he said, were, 1st, *Formal adjudications* of the courts of law; and where they were sufficient to clear the doubt, the difficulty was at an end. 2dly, If they were not sufficient, the next best authorities to resort to, were the *dicta* of learned authors and writers upon the subject. 3dly, When they both failed, recourse must be had to the common understanding of persons executing that part of the law. And *lastly*, general considerations of convenience and public utility were to be adopted. He should therefore submit to the court an argument drawn from all these sources; and hoped to satisfy the court, that the defendant ought to be considered, for the purpose of this question, as a person *using the trade of merchandize*. And *first*, upon authorities, the case of *Sarsfield* versus *Witherby*, *Comb.* 152. would, he conceived, be nearly decisive of the question. That was an action brought by the indorsee of a bill of exchange drawn by the defendant when at *Paris* on his travels. The note came by several mesne indorsements into the hands of the plaintiff, who brought his action on *the custom of merchants*, stating the defendant to be a *merchant*. The defendant pleaded that he was *no merchant*, but a *gentleman* on his travels; and therefore not liable to the plaintiff's action. The plaintiff demurred, and the court held the plea was *good*. But upon a writ of *error* in the *Exchequer* chamber, the plea was over-ruled:

* Stat. 13 *El. c.* 7. 1 *Jac.* 1. *c.* 15. 21 *Jac.* 1. *c.* 19. The words of the latter statute are, "all and every person or persons using, or that shall use *the* "*trade of merchandize*, by way of bargaining, *exchange*, bartering, chevisance *or* "*otherwise*," in gross or by retail, *or* seeking his or her living by buying or selling, or that shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody.

And

1778. And the words of Lord Chief Baron *Pollexfen* upon the occasion were remarkable; "This is a *merchandizable act*, and *hinders* the "defendant from pleading that he was *no merchant*." And the report adds, "that judgment was reversed, for that he was a "*merchant* by the *taking up of money*, and *drawing the bill*."

Hankey *versus* Jones.

Lord Mansfield.—The question here arises on a special case: Whether this act of drawing bills, is such an act as makes the defendant a *scrivener* within the meaning of the several statutes against bankrupts? *Every* man who draws bills of exchange, does a *merchandizable act*; but that does not make him liable to be a bankrupt.

Mr. *Douglas*. The next case is *Richardson* v. *Bradshaw*, 1 *Atk*. 128. That arose on a feigned issue, to try whether one *Wilson* was a *trader*; and whether he was a *banker*. The case was tried before Lord Chief Justice *Lee*; and by the report it appears, that upon the first question, "*Wilson*, who was an agent, drew on "*Johnson*, who was another agent, to the amount of 280,000*l.* "and *he* drew on *Wilson* to the amount of 290,000*l.*: but there was no commission money on either side. It was proved in the cause by various merchants, that *drawing and redrawing* bills to such an amount was a *trafficking in exchange*, and such a trafficking as would make a man liable to a commission of bankruptcy. The jury asked the judge, "Whether such drawing and redraw- "ing was in point of law a *trading*?—The judge said, it was not "so much a *point of law* as a point of *fact*, to be determined by "them on the *usage of merchants*; and if they paid credit to the "evidence, this was a trading. The verdict given by the jury "was, that *Wilson* was a trader and a bankrupt.—There was no "motion for a new trial, and the case was acquiesced in." It is true, there have been doubts whether the direction of Lord Chief Justice *Lee* was right. But as the case was acquiesced in, it is a very strong authority for the plaintiff.

Lord Mansfield.—I was counsel in that case. I do not remember there was any motion for a new trial: But a very material circumstance there was, that *Wilson* kept other people's money.

Mr. *Douglas*. *Thirdly*, Merchants may be consulted as to the usage and custom amongst them. In *Mich*. 19 *Jac*. 1. *Winch*. 24. in the case of *Vanheath* versus *Turner*, *Hobart* Chief Justice said, "If any doubt arises about the custom of merchants, the court "may send for the merchants to know it." So in *Hardres*, 485. *Hale* Chief Baron said, "It were worth while to enquire what "the course had been amongst merchants, or to direct an issue

"for

" for trial of the custom amongst them." In *Edie* versus *The East India Company*, 2 *Bur.* 1216. where a bill of exchange was drawn by Lord *Clive* on the *East-India Company*, made payable to one *Campbell* or *order*, who indorsed it over to *Ogleby*, *without* the words "*or order*," who indorsed it over to *Edie*, *with* the words "*or order*," the question was, Whether it was assignable? Lord *Mansfield* at the trial was of opinion, "that it was a proper " question to be enquired of the merchants. But the court after- " wards held it improper, because the point had been already ad- " judged"—Mr. *Douglas* said, 'He should infer from this case, " that where a question is not settled by the *lex mercatoria*, it " was competent to enquire of merchants what the usage was. " He did not mean it was competent to ask, Whether such a " one was a *bankrupt*? but it was competent to ask, Whether " such a particular transaction amounted to a *trafficking* in ex- " change within the *usage* of *merchants*? That though there " were no merchants examined at the trial of this cause, it was " the *general opinion* of merchants in the city of *London*, that this " was a *drawing*; and that opinion was corroborated by the " case of *Richardson* versus *Bradshaw*. *Lastly*, on the ground of " public convenience and utility, he said, it appeared to him " most necessary to the spirit and freedom of commerce, that " there should be a facility of raising great sums of money for " the purposes of trade, without the formal, solemn security ne- " cessary from persons who are not merchants. That large " sums of money were daily advanced to persons, who dealt in " drawing and negotiating notes in the manner *Jones* had done, " upon the faith that such persons were liable to the bankrupt " laws. If so, though it might not strictly be said to be a trading, " it fell within the maxim, that *communis error facit jus*. Upon " the whole, therefore, he submitted, that the defendant was " subject to the bankrupt laws."

1778.

HANKEY *versus* JONES.

Mr. *F. Walker*, *contra*, argued, that the defendant did not come within the description of a person using the trade of merchandize. As to the case of *Sarsfield* versus *Witherby*, it was necessary for the plaintiff to declare upon the custom of merchants.

Lord MANSFIELD.—That case has nothing to do with the construction of the bankrupt laws: A man merely drawing a bill payable to a person who has bought a horse or any thing else, will not make him a bankrupt. The question here is, Whether this man comes under any of the descriptions of a person liable to a commission of bankruptcy, within the true intent and meaning of the statutes concerning bankrupts?—Mr. *F. Walker*, the other case

that

1778.

HANKEY *versus* JONES.

that has been cited of *Richardson* v. *Bradshaw* makes for the defendant; because there, it was adjudged to be an *exchange* and *rechange*; a *drawing* and *redrawing* within the acts of parliament. With respect to public utility and convenience, arguments drawn from thence are only of use where the law is silent. But they cannot be opposed to adjudged cases; no more can the private opinions of merchants: Much less can they, upon the construction of laws so penal as the statutes against bankrupts, by which some offences are made even a capital felony. Then, as to the *facts* from whence it is inferred that the defendant is a *trader*; they are, 1st, "That the defendant has had great un-" dertakings in the draining of lands and improving them; and "that, to raise money for this purpose, he drew bills of exchange "to a considerable amount; which bills were accepted by dif-" ferent persons." But the mere drawing bills of exchange, in the manner and for the purpose above stated, is not a drawing within the intent of the bankrupt laws. If it were, every body who has drawn bills of exchange would be within the description of a person liable to become bankrupt. Will the *acceptance* of bills so drawn assist to make the transaction more a trading? Clearly not. With respect to the rest of the facts stated, they are so far from amounting to a trading, that they are a proof of the very reverse. For, instead of trafficking with these bills so drawn, for *barter* or *profit*, the only act he does is to pay commission money, besides interest, to the different persons upon whom they were drawn, or who discounted them. In *Wilson*'s case, he was concerned in *drawing* and *redrawing*, which is a trading within the intent of the act. And persons concerned in that branch of trade are well known by the name of *exchange brokers*. But in this case, the defendant was never drawn upon; he only drew; and *that*, not for the purposes of trade, but for the particular purpose of *draining* and *improving lands*, which is no species of trading within the provisions of the bankrupt laws. Therefore there is no pretence for saying he is an object of them.

Lord MANSFIELD.—This is a question upon the construction of the statutes concerning bankrupts; and the case states particularly the only thing done by the defendant, from which it can be argued that he is become a bankrupt, within the description and meaning of the bankrupt laws. By the statute 13 *Eliz*, *c*. 7. the description is this: "*Any merchant* or other person "*using* or exercising the *trade* of *merchandize*, by way of bar-

"gaining,

"gaining, exchange, rechange, bartry, chevisance or otherwise, "in gross or by retail, or seeking his or her trade of living by "buying and selling." The stat. 21 *Jac.* 1. *c.* 19. gives a fuller description. "All and every person or persons using, or that "shall use the *trade* of *merchandize*, by way of bargaining, ex-"change, bartering, chevisance or otherwise, in gross or by "retail; or seeking his or her living by buying and selling; or that shall use the trade or profession of a *scrivener*, receiving "other men's monies and estates into his trust or custody, who "at any time after, &c." These are the descriptions of a bankrupt. And the facts necessary to shew what was the nature of the business carried on by the party being laid before the court, whether they come within any of the descriptions enumerated in the statutes, is a question of *law* upon the construction of the statutes themselves. It is not using an *act* of merchandize. Every man does that: Every man buys: But that does not bring a man within the description of a person liable to become bankrupt. He must use the *trade* of *merchandize*. He must therefore *sell* as well as *buy*: nor will every act of selling do; for there are various species of selling, which are no trading within the meaning of the acts; as where a farmer buys in sheep, and sells them again, &c. The fact stated in the present case, from whence it is contended that the defendant is liable to a commission of bankrupt, is, that on *his own account*, and for his *own benefit*, he has *raised money* on his *own bills*, at the expence of paying a quarter *per cent.* commission, and 5 *per cent.* interest: And, to better his credit, has been used to get an additional security from other persons, by borrowing their bills; in lieu of which, he gave them his own to the same amount. The question therefore is, Whether the circumstance of a man borrowing money on his own bills, for his own occasions, makes him an object of the bankrupt laws.—I had not a particle of doubt at the trial: But I desired a case to be made for the opinion of the court, for the sake of that, which perhaps is more important than doing right: to bring all questions upon mercantile transactions to a certainty. General verdicts do not answer the purpose: But when a case is made, the profession know the result, the merchants know the result: And I rather desired it in this case, on account of the authority of *Richardson* versus *Bradshaw*, which has been so much relied on. As to that case, see what it was: *Wilson* was an agent to 26 regiments, and lived in *London.* *Johnson*, his correspondent, was also agent to many regiments and lived in *Dublin*.

1778. *Dublin.* The troops were occasionally in *England* and *Ireland*; and when the troops that were in *Wilson*'s department were in *Ireland*, *Johnson* raised money to pay them: And so *vice versâ*. *Wilson*, from the year 1745 to 1757, drew on *Johnson* to the amount of 280,000 *l*; and *Johnson* drew on *Wilson* to the amount of 290,000 *l*. They took no commission, and there was no reason why they should; for the advantage was equal. If one did not pay, he did not receive: And so with respect to the other. But what was the *purpose* of their *redrawing?* They drew for the money of many thousand persons, officers, widows, and soldiers together: And there was a visible gain from thence arising from the exchange. What was the determination of the jury? Though it was not their province to say; it was a very sensible one: "Drawing and redrawing may or may not be exercising trade and merchandize." It depends on circumstances. Suppose a person in *Yorkshire*, with a large estate, has occasion for money to pay a debt on mortgage, or any other security in the city of *London*; he draws on his banker for it, and to repay him, tells the banker to draw on him by bills. Would that be a drawing and redrawing, so as to constitute a trading within the meaning of the bankrupt laws? Certainly not. But take it the other way; that a person has the cash of other people, to the amount of many hundred thousands of pounds, and the benefit of the exchange arising from the remittance of it. *That* is merchandizing: And *that* was the ground upon which the jury went in the case of *Wilson*. There is no greater fault in citing cases, than that of drawing general conclusions from particular premises. In *Wilson*'s case it was said, "That drawing "and redrawing was merchandize." It does not follow that all drawing and redrawing is merchandize. The words of the jury in *Wilson's* case were, "that drawing and redrawing for such "large sums of money is trafficking in exchange." But there was no redrawing in the present case; nobody redrew on the defendant, and all the drawing was to his loss, and tended to his ruin; for he paid a quarter *per cent.* commission, besides interest, on every bill he drew. With regard to what passed at the trial in *Wilson's* case, with great respect to Lord Chief Justice *Lee's* memory, I think the jury asked him a very proper question; Whether this drawing and redrawing was, in *point* of *law*, a trading in merchandize within the statutes concerning bankrupts? And as the note is taken, he might have *directed* them as it is there said he did. But the report says, "He told them it was a

HANKEY *versus* JONES.

HANKEY *versus* JONES.

" question of *fact*, and not of *law*." With all deference to his opinion, it was a question of law upon the fact. It may be proper to leave it to the jury, whether the person gets a profit or remits other people's money; but the fact being established, the result is a matter of law. In *Wilson*'s case he had vast sums of other people's money. But this case is stript of every circumstance of that kind: Merely a drawing by a person for the purpose of improving his own estate; and he pays discount on what he draws. Therefore, there is no colour for saying he is within the description of the bankrupt laws.

The other judges concurred.

Per Cur. Postea to be delivered to the plaintiffs.

REX *versus* JOHN WHITAKER.

Thursday, Feb. 12th.

THE defendant was summoning bailiff to the sheriff of *Middlesex*; and it was his province to summon jurors to attend to try causes. An attachment was granted against him, upon a *charge* of *demanding* and *receiving* money from several of the inhabitants to excuse them from serving, and for summoning such as refused to pay him, more frequently than it came to their turn. Being examined upon interrogatories, it appeared to the court upon the report of Sir *James Burrow*, that he admitted having received small sums from several individuals. That in some years he received in the whole about 60 *l.* or 70 *l. per annum*; and in every year something, though sometimes not more than 20 *l.* But he *denied* ever having *demanded* it, or having ever been guilty of *partiality*, either in excusing those who paid him, or in summoning those more frequently than he ought to have done, who refused to pay him. He swore he received it only as a *Christmas-box*, which had been customary; and in no other view whatever: And positively denied that he ever acted with any partiality in consequence of its being given or refused.

The court thought this to be a very bad practice, and of very evil example: Wherefore they fined him 200 *l.* and ordered him to be committed, 'till paid. They added, that the sheriff should be informed of this, and that it should be recommended to him to discharge this man from his office of summoning bailiff.

THE END OF HILARY TERM.

Memorandum.

1778. *Memorandum.* On the 1ſt of *March* died Mr. Juſtice *Aſton*, aged ſixty-two years.

He was ſucceeded by *Francis Buller*, Eſq. one of his Majeſty's counſel learned in the law. Mr. *Buller* kiſſed hands on the 1ſt of *May*. On the 6th, being the firſt day of *Eaſter* Term, he was called Serjeant;—the motto on his rings, *vim temperatam*. He was ſworn in the ſame evening; and on *Friday* 7th he took his ſeat on the bench.

EASTER TERM

18 George III. *B. R.* 1778.

Whitfield *versus* Lord Le Despencer *et al.*

Friday, May 8th.

Case does not lie against the Post-master general, for a bank-note stolen by one of the *sorters* out of a letter delivered into the the Post-office.

IN Case, the declaration consisted of *three* counts. The *first* stating, that whereas by stat. 9 *Ann. c.* 10. for establishing one General Post-office throughout the kingdom, *&c.* it was enacted, that there should be one General Letter-office erected in the city of *London*, *&c.* and that one Post-master General should be appointed by letters patent under the Great Seal, which said Post-master and his deputy, and deputies, *&c.* and *no other person* should have the receiving, *&c.* of all letters: By virtue of which said act, one General Post-office was erected, *&c.* and also a post was established, between the city of *London*, and the town of *Lewes*, in the county of *Sussex*. And whereas by letters patent in pursuance of the said act, the *defendants* were *appointed* to the office of *Post-master General*, TO HAVE AND TO HOLD the same with all powers, *&c.* for and during his Majesty's pleasure; *except* always and reserving to his said Majesty, *&c. all* and every the *duties* and sums of *money* payable for the *postage* of letters, *&c. &c.* And whereas by the said letters patent, his Majesty, out of his special grace and mere motion, did give and grant to the said defendants the salary of 2,000 *l. per annum*, *payable* out of the *revenue* aforesaid, by the hands of the receiver or receivers general thereof; by virtue of which said letters patent, the defendants were possessed of the said office; and the said defendants holding and exercising the said office, the plaintiff, on the 24th of *September* 1774, was possessed of a certain promissory note, *&c.* commonly called a *bank-note*, for 100 *l.* and being so possessed, he inclosed* it in a letter sealed and directed to one *John Moxham*, at *Lymington*, in the county of

1778. Whitfield *versus* Lord Le Despencer.

Hants. That the said letter was carried from *Lewes* to *London*; and there was entrusted to the care of the defendants at their office, in order to be sent and delivered by them as directed. Nevertheless they, not regarding the duty of their office, but wholly *neglecting* the same, did *not deliver*, or cause to be delivered, the said *bank-note* so enclosed: By reason of which neglect of the said defendants, and their servants or deputies, the said bank-note was wholly lost out of the said letter.

The *second* count stated, that the plaintiff being possessed of a note for 100*l.* inclosed it in a letter (*ut supra*) and that by the negligence of the defendants and of their servants and deputies, the said bank-note was *taken out* of the said *letter by one Richard Michel, a servant of the defendants*, and *employed* by them as a *sorter of letters*, who converted it to his own use; by reason whereof, the same was wholly lost to the plaintiff. The *third* count charged generally, that the bank-note by the negligence of the defendants was *stolen out* of the letter. The defendants pleaded not guilty. The cause was tried before Lord *Mansfield* at the Sittings after *Michaelmas* Term 1776, when the jury found the defendants *not guilty* on the *first* and *third* counts; and on the *second* they found a *special* verdict, stating in substance as follows.—The statute 9 *Ann. c.* 10. for erecting a General Post-office, setting out the substance of the *second* section. That by virtue of the said act, a General Post-office was erected, and a Post-office established between the town of *Lewes* and the city of *London*, and between *London* and the town of *Lymington*. That by stat. 1 *Geo.* 3 *c.* 1. it was enacted and declared "that the "revenue of the General Post-office should be carried to, and "made part of, the aggregate fund established by the stat. "1 *Geo.* 1. *c.* 12. It then set forth the letters patent appointing "the defendants to the office of Post-master General, bearing "date 11th *December* 1770, thereby granting to them and their "sufficient deputy or deputies full power and authority, and to "*no other person whatever*, to receive, carry, or deliver letters; "and to take and receive, *for the use of his Majesty*, all sums of "money limited by the act 9 *Ann. c.* 10. for the postage of such "letters respectively. And further granting to the said defendants full power and authority to constitute and appoint, by any "writing under their hands and seals, such *deputies*, deputy Post-"masters, substitutes, &c. &c. *sorters*, &c. &c. as they should "think fit and necessary; and them, or any of them, from time "to time to suspend, &c. according to their discretion; and to

"take

"take, in his said *Majesty's* name and for *his* use, from the said "deputy Post-masters or other *inferior officers, such sufficient security* for their faithful discharge of their respective trusts, and "for the payment of the money received by them respectively, "to the Receiver-General of the said revenue for the time being; and from time to time to settle the salaries and allowances to the said inferior officers, as the Commissioners of the "Treasury, or the High-treasurer for the time being, shall first "approve of: The said *salaries* and allowances *to be paid out of the* "*revenue* by the hands of the *Receiver-General:* And further "granting to the said defendants a *salary* of 2,000 *l. per annum,* "*payable* quarterly by the hands of the *Receiver-General:* and in "regard the said Receiver-General is to receive and account for "the said revenue, that the defendants should *not* be *chargeable* "or accountable or *responsible* for the said revenue, or *for the officers* constituted or *appointed by them* as aforesaid; *save only* for "their *own voluntary defaults* or *misfeazances.*" That by virtue of the said letters patent, the said defendants possessed themselves of the said office. That the said *Richard Michell,* on the 21st of *August* 1771, was in due manner appointed by the defendants, a sorter of letters in the inland department; and that on the 6th of *September* following, the said defendants took a *sufficient security* from him in the King's name, and for the *King's use,* for the faithful discharge of the trust of his said office, and for payment of the money to be received by him.—Then it set forth the *oath* taken by *Richard Michell* not to delay, or in any way to embezzle any letter or pacquet, *&c.* That he was employed as a sorter on the 24th of *September* 1774. That he received his *salary* out of the *profits* of the postage, by the hands of the *Receiver-General;* and *not* from the *defendants:* That the plaintiff on the 24th of *September* 1774, was possessed of a bank-note for 100 *l*; that he enclosed it in a letter sealed and directed to *John Moxham,* of *Lymington,* in the county of *Southampton.* That the said letter was delivered into the General Post-office in *London,* in order to be there sorted, and conveyed by the post from thence to *Lymington.* That the said letter with the bank-note enclosed came to the hands of the said *Richard Michell* at the General Post-office in *London,* he being such sorter as aforesaid; and that he feloniously secreted the said letter and stole the bank-note thereout, contrary to the form of the statute. That he was tried, convicted, and executed for the same.

This case was argued twice; first, in last Term by Mr. *T. Cowper* for the plaintiff, and Mr. Serjeant *Walker* for the defendants:

1778. ants: And again in this Term, by Mr. *Lee* for the plaintiff, and Mr. *Bearcroft* for the defendants. The question was, Whether the defendants, by reason of their office, and by reason of the relation in which *Michell, the sorter,* stood to them, were personally liable for the amount of the bank-note found by the special verdict to have been secreted and stolen by him *in the Post-office*: And the general scope of the argument was as follows.—For the *defendants* it was argued, that upon the facts stated in the special verdict, they were not liable to the plaintiff's action in this particular case. 1. Because no personal neglect was brought home to the defendants themselves.—2. From the constitution of the office, as established by the stat. 9 *Ann. c.* 10. *Michell*, and all the other inferior officers were in effect the servants of the public, though nominated by the defendants.—3. The authority of *Lane* v. *Cotton*, 1 Lord *Raym.* 646. was in point, and decisive for the defendants, having remained unquestioned and uncontroverted from the year 1699, to the time of passing the stat. 9 *Ann. c.* 10; and from that time to the present, without any action being brought, or any clause inserted in any statute relative to the Post-office in any wise impeaching it, or intimating a doubt upon the subject. Upon the first point, little was said beyond the terms in which it was stated. Upon the second point it was said, that the stat. 9 *Ann. c.* 10. was made at the request of the subject for a two-fold purpose. 1st, To raise a revenue to government. 2d, For the more secure, convenient, and speedy conveyance of the general correspondence of the kingdom. With this view, the statute directs* that the revenue shall be appropriated to the *use of the public*; which in effect is saying, it shall be applied to the use of every individual in the state: And without doubt, when so applied, every individual equally shares the common benefit.—In like manner, all the officers created by the statute are for the *use of the public*. The Post-master General is the *servant of the public*; he is appointed by letters patent, and his salary is paid out of the public money; so, the deputy sorters, and all the other inferior officers subordinate to the Post-master General, are the *servants* of the *public*, though nominated by *him*. This is apparent from a variety of circumstances. 1st, It is a clear principle, that whoever holds an office which renders him responsible for any act done in it, ought to have the entire management and controul of such office. If responsible for the acts of his servants, he *alone* ought to have the *privilege* of *appointing* them, upon his own terms, and at his own discretion; and

WHITFIELD *versus* Lord LE DESPENCER.

* *Vide sect.* 35. 38. 42

and with as absolute a power over them in every respect, as he has over the servants of his own house. On the contrary, the Post-master in this case can neither fix the posts, nor the rate of postage of letters, nor receive the revenue arising from it; but parliament alone has the right to settle the one, and the Receiver-General is entrusted with the other. 2d, With respect to the inferior officers to be appointed, the power given him by the letters patent, is not a general power of appointing servants; but the offices are all separately and distinctly settled by name. Neither the persons to be hired, nor the terms of their service, are at the discretion of the Post-master: But both are to be approved of by the Treasury. Even the security they are to enter into, and which alone could be the means of the Post-master being indemnified in case of a loss, is not given to *him*, but to the *King*. Another material circumstance is, that by the stat. 9 *Ann. c.* 10. they are required to take the oaths of allegiance and supremacy. This shews the act itself considers them as *public officers*, not as mere deputies of the Post-master. All public officers *must* take the oaths; But it is no necessary qualification of a private servant. No master ever requires his servant to take the oaths; nor is it here left to the discretion of the Post-master to require it; but *enjoined* by the statute. These considerations are amply sufficient to mark the distinction between the office of the defendants, and one, which would render them liable for any act done in it, or for the acts of their servants. 3d, Many of these considerations are equally applicable to shew, that the analogy between the defendants and a common carrier, to whom they have been compared, does not hold. A common carrier fixes his own price; he *may*, and generally does, vary it according to the *value* of the thing to be carried, though of equal size and weight: Whereas the postage of letters is *fixed*, and cannot be varied according to the value.—A common carrier appoints his own servants: If any security is necessary, he takes it to *himself*. If he is guilty of *embezzlement*, it is only a *breach of trust*: In the *Post-master* or his *servants*, it is a *capital felony*.—Besides, in such a case, the *trespass is merged* in the *crime*: Therefore, upon that ground alone, the plaintiff is not entitled to recover. 4th, But, independently of reasoning or principles, the case of *Lane* v. *Cotton*, 1 *Ld. Raym.* 646. is an authority by which the court is bound. It is a solemn judicial decision, and has stood uncontroverted for near a century. Several acts of parliament have been since passed, as well for a new es-

1778. WHITFIELD *versus* Lord LE DESPENCER.

tablishment of the Post-office, as for different regulations which it has been thought expedient to make: And yet at no time has any application been made to redress the grievance now complained of, by altering the law, nor has any action been brought to impeach the propriety of that decision. On the contrary, the stat. 9 *Ann. c.* 10. and the other subsequent statutes are a legislative confirmation of its authority. As to the note at the end of Lord *Raymond's* report, signifying, that upon a writ of error brought, the Post-office paid the money, it would be totally immaterial if true, unless done upon proper and legal advice; but the fact is, that no trace of any such payment can be found in the Post-office, or of any such writ of error being brought*. The conclusion is, that the information given to Lord *Raymond* was not founded: And it is observable that no other reporter takes any notice of it.—For these reasons it was submitted that the action did not lie.

For the plaintiff, *contra*, it was said, that to form a judgment of the subject matter in question, it was material to attend to the state of circumstances, *antecedent* to any regulation for the establishment of a *General Post-office*, to see what were the rights and powers of the subject, prior to such regulation. The *first* step towards erecting a Post-office was by an ordinance of *Cromwell*; *Scobell's* acts, 1656, *page* 511. Prior to that ordinance, every body was at liberty to send their letters, containing bills of exchange or any other valuable property, by any mode of conveyance they might think proper; there being no law that prohibited one person to send, or another to carry, or that regulated the compensation to be given or received, for the postage or delivery of any such letter, &c. But it was part of the *legal liberty* of the subject, to *employ whom he pleased*, and exercisable at his discretion. Motives of public convenience were the *principal* inducement to the establishing a General Post-office; at the same time, it was no inconsiderable object of *Cromwell's* ordinance to prevent *conspiracies*, by subjecting the general correspondence of the kingdom to the inspection of persons appointed to the management of this new branch of revenue: And so it is stated in the ordinance itself. Antecedent to this ordinance, and to the stat. 12 *Car.* 2. *c.* 35. there could be no doubt but that whoever trusted his money or effects to another, and paid hire for the conveyance of them, had his remedy by action, in case

* Lord *Mansfield* upon the first argument directed an enquiry to be made at the Post-office, whether they had any entry or minute of the payment above alluded to, and also whether any writ of error was brought.

of

of a loss, whether occasioned by the negligence of the party employed, or by that of his servants. It was but was reasonable therefore, as well as just, seeing the immense profit arising from this parliamentary monopoly, that government should stand in the same predicament as those, whose office they had engrossed entirely and *exclusively* to themselves. Clearly, there was nothing in the stat. 12 *Car.* 2. *c.* 35. or any other statute relative to this subject, importing that the *condition* of the *subject* should be *worse* than it was *before.* On the contrary, the provisions the statutes contain, are declared to be for the *benefit* of the subject. By the stat. 12 *Car.* 2. power is given to the King alone, "to grant this office at such *rent* as he shall think fit." And in giving judgment in the case of *Lane* versus *Cotton*, 1 Lord *Raym.* 646. it struck one of the judges* as an absurdity too great to be contended for, that if the revenue were *farmed*, the *person farming it* would not be liable. But the difference he takes is, that this office, being an establishment by act of parliament, is *founded in government*, and therefore that the officers belonging to it are absolved from the common obligations of justice. That cannot be. Wherever plain and manifest obligations of justice are to be contravened, it is very easy for the legislature to express such their intention in precise and unequivocal terms; otherwise, every project of individuals sanctioned by an act of parliament, would draw the same dangerous consequences along with it. In acts for making navigable rivers, no reference is had to the law that is incident to the case of common carriers: But whoever is employed to carry the goods of the subject on such rivers, is liable to answer for their own or their servants' negligence. It is a principle of obvious justice that obtains universally. The duty arises out of the trust: And much more strongly in the present case; where, for the express purpose of greater security, the general right and liberty of the subject is so extremely narrowed. But the proposition contended for on the other side goes to make it less secure, by saying, that this is a direct prohibitory law, by which the subject shall be *bound* under a penalty to trust his property to particular persons, *exclusively* of all others, and nevertheless, that such persons shall in no case whatsoever be answerable for the care of it. 2*dly*, As to the objections made to the plaintiff's right of action as against the defendants, the *first* is, that this is no *personal* default in them; but if any, a constructive neglect only, by the misconduct of their servant. The answer to that is,

1778.

WHITFIELD *versus* Lord LE DESPENCER.

* *Gould* Justice. 1 Ld *Raym.* 650.

1778. that in every undertaking, whether public or private, the master is liable for the acts and misconduct of his servants, equally the same as he is for his own. If he were not, every master must necessarily turn labourer and be his *own* servant, for no one would trust the mere mechanic.—Suppose a servant of the bank were to transfer any person's stock without his leave: Would not an action lie against the governors of the Bank? But 2. it is *objected*, that *Michell* was not the defendant's servant, but the servant of the public. — *Answer*. The words of the act are, "that the Post-master and his deputies, &c. by "him employed, shall have the receiving, carrying, &c. of let-"ters, and *no one else*." Besides, the special verdict finds in so many words "that *Michell* was appointed by the defendants person-"ally." It would be singular, therefore, to say, that he was not their servant, but the servant of the public.—3. The *next* objection is, that all the inferior officers appointed under the act, are required to take the sacrament, and also an oath for the due and faithful execution of their trust; and therefore they are to be considered as public officers personally liable, though nominated by the Post-master. *Answer*, That it is only for greater security, and not alone sufficient to exempt the defendants by whom they are appointed.—4. It is said, that the inferior officers continue in their situations, though the Post-master is displaced. *Answer*, Possibly that may be so, because where no objection lies, there is no reason why they should be removed. But whether they can retain their office against the consent of the successor, is a very different question. The office itself is only *during pleasure*. It cannot be therefore that such a person can have a right to communicate to his deputies a higher interest than he enjoys himself.—5. The next objection is as ill founded; That the loss imputed to the negligence of the defendants, is by the special verdict found to be a loss by the *felony* of *Michell*, who has suffered death for it: Therefore, no action lies, the trespass being merged in the felony. *Answer*, That might have been so if the action had been brought against the *offender* (*Michell*) himself. Because it would be of mischievous consequence to let private satisfaction interfere with public justice. But was it ever yet said, that the felony of the servant shall excuse the negligence of the master?—6. The principal objection relied on is this: That the revenue is raised for the use of the King and the public, and that the security given by *Michell*, as well as by all other inferior officers, was given to the King, and not to the defendants.

WHITFIELD *versus* Lord LE DESPENCER.

fendants.—*Answer*, In the first place, the law takes no notice of this security: But it is a mere condition inserted in the letters patent, with which the subject has nothing at all to do; for the act says not a word about it. It authorizes the Post-master to appoint deputies and subordinate officers: But imposes no restriction upon his discretion in so doing. The recognizance to the crown, which is the mode of security, is obviously taken for the sake of a speedier remedy to the crown in all cases of embezzlement or misconduct, affecting its own interest, against those who enter into it. But the Post-master General has an ample salary sufficient to answer all losses of the subject, occasioned by the negligence or other misconduct of himself or his servants; which alone renders him liable. *Morse* v. *Slue*, 1 *Vent.* 190. 238. If it is not sufficient, it is his own fault for accepting it as such. But it is not clear that he may not reimburse himself out of the fund; at least, it is much better that the public should occasionally pay a small sum out of the revenue, than that private individuals should suffer, and the property sent by this mode of conveyance be rendered totally insecure. It would not be difficult however to maintain, that the action would lie even if the defendants had no salary at all. Lord *Coke* in 1 *Inst.* 89. *a.* says, "If a guardian receive the profits of land and be robbed, if it "be without his default or negligence, he shall be discharged "therefrom: But otherwise it is of a *carrier*; for he has his "hire, and undertakes *implicitly* for the *safe delivery* of the goods "entrusted to him."—And substantially there is no difference between the defendants and a common carrier. With respect to the case of *Lane* v. *Cotton*, 1 Lord *Raym.* 646. it is said, no notice is taken in any reporter, except Lord *Raymond*, of the final issue of that case. But *Peere Wms.* in a note, *vol.* 3. *page* 394. confirms the account given by Lord *Raymond*. Mr. *Lee* farther said, the authority which weighed most with him, was the information he had received from Sir *Thomas Parker*, who had authorized him to say, that being in the early part of his life very intimately acquainted with Lord Chief Justice *Willes*, who married a niece of the plaintiff *Lane*, the Chief Justice told Sir *Thomas*, that *Lane* had informed him the money was paid. On the other hand it is true, that search has been made in the *Exchequer* to know if any writ of error was brought, and none such is to be found; nor is there any entry in the Post-office of the money being paid.

1778.

WHITFIELD *versus* Lord LE DESPENCER.

1778. Lord Mansfield.—I fancy, if ever it was paid, there was no entry of it.

Whitfield versus Lord Le Despencer. *Lastly*, Many of the reasons given by the three judges who were for the defendants in that case, went on this ground; that it never was the intention of the legislature that valuable property, but that mere missive letters only, should be sent by that mode of conveyance. But in the stat. 6 *Geo.* 1. *c.* 21. *sect.* 52, it is provided, that all bills of exchange, *&c.* except such as are sent abroad, shall be paid for as so many several letters. Upon the whole, therefore, they submitted that this action was clearly maintainable.

Lord Mansfield.—Upon the last argument we were all fully satisfied; but from the nature and importance of the question, I was desirous of having the opinion of Mr. Justice *Aston*, whose loss cannot be too much lamented: We had the advantage of his assistance; for a note of what passed was read over to him, and he was entirely of the same opinion.

I shall consider this question in *two lights.*—1. As it stood in the year 1699, before the determination of *Lane* versus *Cotton*. 2. As it stands now, since that determination; and also, what has been done in consequence of that decision. And *first* as it stood in the year 1699.—The Post-office, as Mr. *Lee* has truly said, was first erected during the usurpation, by an ordinance of *Cromwell*, and afterwards more fully regulated by the stat. 12 *Car.* 2. *c.* 35. There never had been any action brought, either upon that ordinance or upon the statute, till the case of *Lane* versus *Cotton*; and the same mode of action that is now brought, was the mode fixed upon in the case of *Lane* versus *Cotton*. But neither from the draught of the declaration by the advisers of that action, nor in the opinion of the judges upon the question, does it appear to have entered into the imagination of either, that this was a *demand upon the fund*, as it has been now argued; for the *form of action* is not applicable to such a demand. If there could be a demand upon the fund, it must be by a totally different form of action. But this is a demand upon the *Post-master personally*, upon the ground of a neglect in him by his own act, or *constructively* so, by the fault of his servant. If the fund were in the nature of a policy of insurance to insure every man who sends bills or notes by land or sea carriage, from a loss by robbery or neglect, such contingency would be a deduction out of the fund; and no doubt in that case, if a loss were to happen, upon an action brought against the

the proper officers they would be liable; being bound by the positive constitution of the office to insure every person, for the fixed and established rate of postage. But here, the act of parliament has *appropriated* the *whole revenue*. Therefore if a loss is paid, there must be an *item* of it; and that *item* must come *under* the *appropriation*. But it is manifest no such idea was ever thought of at the time. If it had been thought of, the ordinance of *Cromwell*, or the act of parliament would in terms have charged the fund for all losses arising from neglect or otherwise. 1778. WHITFIELD *versus* Lord LE DESPENCER.

But neither this action, nor the case of *Lane* versus *Cotton*, is founded upon the ground of the *fund* being *liable*. What then is the ground? It is, that the Post-master in consequence of the *hire* he receives, is liable for all the damage that may happen, whether owing to the negligence or dishonesty of the persons employed under him, to conduct and carry on the business of the office. If that position were founded in the extent in which it has been stated, it would go the length of making the defendants liable in *all cases* whatsoever. But the argument of Lord Chief Justice *Holt*, who differed from the other judges in the case of *Lane* versus *Cotton*, does not extend so far as that; for he takes a *difference* between the case of a letter *lost in the office* by a servant employed under the Post-master, and that of a *loss upon the road*, or by the *mail* being *robbed* after the letter has been sent safe *out* of the office. The ground of Lord Chief Justice *Holt*'s opinion in that case, is founded upon comparing the situation of the Post-master to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a Post-master and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. The Post-master has *no hire*, enters into *no contract*, carries on *no merchandize* or *commerce*. But the Post-office is a *branch of revenue*, and a *branch of police*, created by act of parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the *public*, arising from the fund. —As a branch of police, it puts the *whole* correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the crown, and officers appointed by the crown. There is no analogy therefore between the case of the Post-master and a common carrier.—The branch of revenue and the branch of

police

1778.

WHITFELD *versus* Lord LE DESPENCER.

police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give *security* to the *crown*. One requisite is, that they shall *take the oaths* taken by all *public officers*: Another strong guard is, that they are made subject to heavy penalties; and this is carried so far, that, what in the case of a *common carrier*, or any other person, would be only a *breach of trust*, is in *them* declared to be a *capital felony*. All these advantages the law provides for the security of the subject, in consideration of their being obliged to send their letters by this mode of conveyance. But the statute does not make the Post-master liable for any act done, except in one particular case; which is very remarkable, because it makes him liable for his own fault only, (and *not* for that of his deputies,) in a case where it is hardly possible for the Post-master himself to be personally in fault. The statute (*sect.* 5.) creates a monopoly in the Post-master and his deputies or substitutes, of *providing post-horses*. And if any other person presumes to let to hire any post-horse, for the purpose of carrying letters, *&c* he is liable to a penalty of 5*l.* *except* where the Post-master or his deputies do not furnish horses within half an hour after an application made; for then the party is at liberty to hire a horse elsewhere. And in that case, "if it be through *default* "or *neglect* of the *Post-master* or his *deputy*, that such person fail of "being furnished with a sufficient horse or horses in time, then "the *Post-master* or his deputies are to forfeit 5*l.*"

As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the Post-office, loses any of them, he is answerable; so is the *sorter* in the business of his department. So is the Post-master for any fault of his own. Here, no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a *constructive* negligence only, by the act of their servants. In order to succeed therefore it must be shewn, that it is a loss to be supported by the Post-master, which it certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an act of parliament, the salary annexed to the office, is for no other consideration than the trouble of executing it. The case of the Post-master, therefore, is in no circumstance whatever, similar to that of a

common

common-carrier; but he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c. who were never thought liable for any negligence or misconduct of the inferior officers in their several departments.

Thus then the question stood in the year 1699. In that year a solemn judgment was given, that an action on the case would *not* lie against the Post-master General, for a loss in the office by the negligence or fault of his servant. The nation understood it to be a judgment: And therefore it makes no difference, if what has been thrown out were true, and the writ of error was stopped in the way that has been mentioned. For the bar have taken notice of it as a judgment; the parliament and the people have taken notice of it, every man who has sent a letter since has taken notice of it; many acts of parliament for the regulation and improvement of the Post-office, and other purposes relative to it, have passed since, which by their silence have recognized it. The mail has been robbed a hundred times since, and no action whatever has been brought. What have merchants done since and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times: one, by this day's post, the other, by the next. This shews the sense of mankind as to their remedy. If there could have been any doubt therefore before the determination of *Lane* versus *Cotton*, the solemn judgment in that case having stood uncontroverted ever since, puts the matter beyond dispute. Therefore, we are all clearly of opinion the action will not lie.

Per Cur. Judgment for the defendants.

HARE *versus* CATOR.

Same day.

Declaration against the defendant as assignee of all the estate, &c. in certain premises: Evidence that he is assignee of part only is a fatal variance.

IN covenant the plaintiff declared against the defendant as *assignee* of *all* the estate, right, title, and interest in certain premises by her demised to Lord *Bolingbroke*. The defendant pleaded, that the estate, right, title, and interest of the said Lord *Bolingbroke*, to the said demised premises in the declaration mentioned, did not come to his possession by assignment, as in the said declaration alleged: And thereupon issue was joined,

The

1778.

HARE *versus* CATOR.

The cause came on to be tried at *Westminster*, before Lord *Mansfield*, at the Sittings after *Michaelmas* Term, 1777, when the jury found a verdict for the plaintiff, damages 1,750 *l.* costs 40*s.* subject to the opinion of the court upon a case, stating in substance as follows: The marriage settlement of Lord *Bolingbroke*, dated *November* 4th, 1765, by which certain premises consisting of the manor of *Beckenham*, and *eleven farms* in *Kent*, and other estates of the yearly value of 3,250 *l.* of *which the premises in question were part*, were conveyed to trustees to the use of Lord *Bolingbroke* for life, with remainders over: with a power to Lord *Bolingbroke* to lease, &c. and also a further power with the consent of the trustees to revoke the uses of the said settlement. 2. That by indenture of the 24th *July* 1770, Lord *Bolingbroke*, for the consideration there mentioned, demised the *eleven farms* in *Kent*, *and a messuage or tenement in Peckham*, in the county of *Surrey*, to the plaintiff for 99 years, if he the said Lord *Bolingbroke* should so long live, at a pepper-corn rent. That by indenture, 25th *July* 1770, the plaintiff re-demised all the said premises to Lord *Bolingbroke*, at the yearly rent of 500 *l.* for the term of 98 years and 11 months, if the said Lord *Bolingbroke* should so long live. Then it set out an indenture of the 20th of *October* 1773, revoking the uses in the settlement. That afterwards, by *lease* and *release* of the 21st and 22d of *October* 1773, made between the trustees under the said settlement of the one part, Lord *Bolingbroke* of the second part, and the defendant of the third part, reciting the said settlement, the revocation of the uses, and that the defendant had contracted for the purchase of the *premises at Beckenham*, for 19,688 *l.* the said trustees in consideration, &c. granted and conveyed the said *manor and estates at Beckenham*, to the defendant, his heirs and assigns.——That the defendant *Cator* had *no assignment* of the said *term of 99 years*, granted by Lord *Bolingbroke* to the plaintiff, nor of the re-demise granted by the plaintiff to the said Lord *Bolingbroke*.—That it appeared by the evidence there given for the plaintiff, that the defendant had notice of the annuity granted to the plaintiff, and of the manner in which it was secured, before he completed his purchase. And that the price paid by the defendant *Cator* for the purchase of the said estate, was not beyond a fair and adequate price, on a supposition of the estate being bought subject to the payment of the annuity granted to the plaintiff. The defendant's counsel objected to the *form* of the action, by reason that the *estate in Surrey*, let at 110 *l. per*

ann.

ann. comprised in the re-demise from the plaintiff to Lord *Bolingbroke*, was *not purchased* by the defendant. The question for the opinion of the court was, Whether the action might be maintained? If the court should be of opinion that the action could be maintained, then a verdict[k] to be entered for the plaintiff, damages 1,750 *l.* and costs 40 *s.* But if the court should be of opinion, that the action could not be maintained, then a nonsuit to be entered. 1778. HARE *versus* CATOR.

This case was argued by Mr. *Morris* for the plaintiff, and by Mr. *Davenport* for the defendant; and several points arose. 1. Whether under the circumstances of the case, the defendant was assignee at all? 2. If assignee, Whether, as being assignee of part only, he was liable for the whole, or only an apportionment of the rent? 3. Whether the action could be supported in point of form; the declaration charging that the defendant was assignee of the whole; whereas by the evidence it appeared he was assignee of part only?—Mr. *Morris* for the plaintiff contended, that the rent being reserved upon all and every part of the premises, the defendant was clearly liable for the whole rent, though assignee of part of the premises only: And for this he relied on the case of *Broom* versus *Hoare*, *Cro. El.* 633. As to the objection in point of form, he said, that though the declaration was more large than the truth of the case would warrant, the plaintiff was equally entitled to recover upon what did appear in proof.

Mr. *Davenport* for the defendant *contra*, said, he should confine himself to the objection in point of form, Whether the defendant being charged as assignee of the whole, proof of his being assignee of part only was sufficient; and he contended it was a fatal objection. But if it were necessary to go into the other points, it would be sufficient to observe, that the case of *Broom* v. *Hoare*, did not at all apply to the present: For there the defendant was the *original lessee*, who had assigned part of the premises, and continued in possession of the remainder; and no doubt, as against the *original lessee*, debt will lie for the *whole* rent, though he retain only *part* of the premises; because of the *privity of contract*. But an assignee is liable only from the *privity of estate*: consequently, must be charged according to *the truth of the case*; which here is, that he is assignee of *part* only. Therefore, he prayed a nonsuit might be entered.

The court gave no opinion upon the point, Whether the defendant was assignee; but determined upon the objection in

1778. point of form that the defendant was *improperly* charged as assignee of the *whole*, against the truth of the case; being, if at all, assignee of *part* only. Accordingly, a nonsuit was entered.

HARE *versus* CATOR.

Monday, May 11th.

BOLDERO *versus* GRAY.

Practice. Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail bond becomes forfeited, the plaintiff may *except* to bail put in, in order to stay the proceedings on the bail bond, and it will *not* be a *waver* of the *assignment*.

UPON shewing cause why the proceedings on the bail bond in this case should not be staid with costs, the facts appeared to be, that the writ was returnable on the 27th of *January*. A summons was taken out for time to put in bail: The defendant's attorney swore he attended a little after six o'clock, that he continued till *past seven*; and was *not informed* any person attended, upon which he took out another summons for the next day.—The plaintiff's attorney swore he attended: Enquired of the clerk if any person attended for the defendant, and was *told no one attended*: Upon which he took an assignment of the bail bond. The defendant then took out an order for staying proceedings, but no bail was put in above; so nothing could be done. On the 31st there was another attendance, when it was alleged no bail was put in, the bail put in being at the suit of the plaintiff, *assignee* of the sheriff of *Middlesex*, which was not this action.

Mr. *Wallace* in support of the rule insisted, that, after regular bail put in, if the plaintiff excepts to them, it is a waver of the proceedings on the bail bond. [*N.. B.* This was allowed by the *Master*, and agreed to be the *universal practice*.] On the other hand, this practice was objected to as a serious hardship upon the plaintiff, by forcing him, if he *did except* to the bail above, to wave the benefit of the bail bond; and if he did *not* to be put off with bad bail, in case the proceedings upon the bail bond were set aside. The court thought the objection very forcible and strong: And accordingly made a rule, that in future wherever the defendant is guilty of a neglect, in not putting in bail in due time, by which the bail bond becomes forfeited, the notice (in case the party means to put in bail in order to stay proceedings upon the bail bond) should be, that he will put in and *perfect* bail on such a day, analogous to the case where the sheriff is ruled: who, before he can discharge himself, must give notice that he will put in and perfect bail: And in that case the plaintiff may oppose the bail in court, without its being a waver of the bail bond.

RICHARDS, *qui tam, versus* BROWN.

Tuesday, May 12th.

Willes, Justice, absent, in Canc.

Where more than 5 *per cent.* is taken, if the *substance* of the contract be a *borrowing and lending*, a slight *colourable contingency* only, will not take it out of the statute of usury.

UPON shewing cause why a new trial should not be granted, the case, as it appeared from the report of Lord *Mansfield*, was in substance as follows: This was an action on the statute of usury, in which the declaration stated, that on the 28th of *October* 1773, the defendant, upon a corrupt bargain, received 35*l.* from one *Heighway*, for the forbearance of 420*l.* from the 20th of *December* 1772, to the 20th of *June* 1773. At the trial, *Richard Heighway*, who was the borrower of the money, and the only witness as to the transaction, said, that he borrowed of the defendant 200*l.* in the year 1769, which was settled six months after. That on the 5th of *September* 1770, he applied to the defendant to *lend* him 600*l.* saying, he was owner of 2,042*l.* Bank annuities vested in trustees, to be transferred to him upon making out his title to an estate which was very clear; and shewed *Brown* the declaration of trust. The defendant said, he would *lend* him 600*l.* or 1000*l.*; and supplied him with 200*l.* for which *Heighway* gave him a bond, and deposited the declaration of trust as a collateral security; and *Brown promised* he should have the *remaining* 400*l.* in a *fortnight's time.* On the 17th of *September* *Heighway* called for the other 400*l.*: the defendant then told him "money was very scarce, upon the prospect of a *Spanish* war."—*Heighway* pressed him very much; upon which he said, he would see what could be done, and bid him call the next day. *Heighway* did so in the morning, but the defendant was not at home. He called again in the evening, who then saw *Brown*, who said he was afraid he could not raise it himself, but would try to get it of a friend in the city, who never was without money; but he was a *very hard man.* *Heighway* asked what his terms were. The defendant said, they were so exorbitant he was almost ashamed to name them. *Heighway* said he would rather pay 20 or 30 guineas than not have the money. The defendant said, his friend was not so hard as that; but that he never *lent money, but* upon *annuity* at 6 *years* purchase: However, said the defendant, "if you will take the money on "those terms, I will engage to furnish you with money to re-"deem in *three* months time. The quarter's annuity will come "but to 17*l.* 10*s.* which will be better than giving 20 or 30 "guineas." This being agreed to, on the 20th of *September* 1770, *Heighway*

1778. Heighway called upon Brown for the money, and found a bond and warrant of attorney, &c. prepared for securing an annuity from him to one *Waters*. *Heighway* executed it; and *Brown* signed it as the subscribing witness. After the bond was executed, *Brown* said, he was always used to have 5 *l. per cent. procuration money*; but as *Heighway* was distressed, he would only take *two and a half per cent.* and accordingly took 15 guineas, and *Heighway*, left the declaration of trust with him. *Heighway* said, "the *defendant first proposed* an *annuity*: He *himself would* "*not have granted one.*" When the first quarter's annuity was due, *Heighway* applied to the defendant, and pressed him for money to redeem, as he had promised. *Brown* refused. He then asked for the declaration of trust; the defendant said, if he insisted upon it, *Waters* would enter up judgment. *Heighway* insisted upon it; and judgment was entered up. *Heighway* paid the *defendant one year* and *one quarter's annuity*, and one quarter to the defendant's partner. The defendant often denied that he had promised *Heighway* money to redeem; and said he wondered how he could expect him to lend money at 5 *per cent.* when others made 16 and half *per cent.* of their money. Afterwards *Brown* acknowledged he was himself the *principal* that advanced the money, and enjoyed the annuity; and said, that Mr. *Waters*, whose name had been made use of, was his trustee. —*Waters* † swore that the defendant had sometimes purchased annuities in his name, but that he knew nothing of *this*.—I told the jury, if they were satisfied that in the true contemplation of the parties, this transaction was a purchase by the one, and a sale by the other, of a real annuity, how much soever they might disapprove of or condemn the defendant's conduct, they must find a verdict for him. But, on the contrary, if it appeared to them to have been in reality and truth the intention of both parties, the one to *borrow*, and the other to lend; and that the form of an annuity was only a mode forced on the necessity of the borrower by the lender, under colour of which he might take an usurious and exorbitant advantage, then they might find for the plaintiff, notwithstanding the contingency of the annuitant dying within three months; more especially, as it was understood by both, that the annuity, at the expiration of three months, was to assume the direct shape of a loan.—The jury afterwards came to my house, where they said, they agreed with me in detesting the transaction, but they thought *there was*

RICHARDS *versus* BROWN.

† *N. B.* He was *subpœnaed* by the defendant, but examined by Lord *Mansfield's* order.

an

an annuity. I repeated my former direction to them; they retired again, and at length found for the *plaintiff*.—On *Thursday* and *Saturday* the 5th and 7th of *February* in *Hilary* Term last, Mr. *Wallace*, Mr. *Buller*, Mr. *Dunning*, and Mr. *T. Cowper*, shewed cause against the rule, and Mr. *Mansfield* argued in support of it. 1778.

RICHARDS *versus* BROWN.

On the part of the plaintiff the counsel stated the question to be, Whether the evidence given at the trial amounted to proof of a loan? for if it did, no shift or contrivance, no risk or chance, could take it out of the statute; and they contended, that clearly and manifestly upon the face of the transaction, it imported a *loan*; and that the form of an annuity, under which it was disguised, was merely a contrivance to evade the statute. 1. The application by *Heighway* was expresly and in terms an application for a *loan*. The defendant actually advanced part of the money at the time; and promised to *lend* him the remainder in a fortnight. The subsequent treaty for the remainder, on the part of *Heighway*, was clearly for a *loan*; and the proposal of turning it into an annuity came from the defendant. But even at that time, the idea of its being a *loan* was so strong in *his* mind, as well as in that of the plaintiff, that the answer he gives the plaintiff is, that "his friend never *lends money, but* in "the *form of annuity*;" *not*, that he *never lent money*, but *only dealt in the purchase of annuities*, or any declaration of that kind, which might shew he would not be concerned where the transaction was to be a loan. But whether a transaction is a loan or not, is a matter that depends upon the intention of the parties; therefore, clearly proper for the jury: and here, they have found that the transaction was a loan. If so, the risk of the borrower dying within three months, will not prevent its being usury. It is true, this is a case upon the statute: But the old cases go upon the same principle. They are all collected in the case of Lord *Chesterfield* versus *Janssen*, 1 *Atk.* 301. to 355. and they all agree, that the material point to be considered is, whether there is a *communication for a loan of money*. 4 *Leon.* 208. *Fuller*'s case.—*Cottrell* v. *Harrington*, 1 *Brownlow*, 180. *The King* versus *Drury*, 2 *Lev.* 7. S. P. If the real substance is a loan, a *small risk* will not take it out of the statute. In *Clayton*'s case, 5 *Co.* 70. an agreement to pay 33 *l.* for the loan of 30 *l.* from the 6th of *December* to the 2d of *June* following, *if the borrower should then be alive*, was held *usurious*, for the reason given by *Popham*, Chief Justice, in *Burton*'s case, 5 *Co.* 69. *that*

1778. RICHARDS *versus* BROWN.

if it should be out of the statute for the *uncertainty of the life*, the statute would be of *little effect*. *Burton* versus *Downham*, *Cro. Eliz.* 642. S. P. *Ibid.* 741. *Beddington* versus *Ashley*, S. P. *Roberts* versus *Tremayne*, *Cro. Jac.* 507. S. P. *Mason* versus *Abdy*, *Carthew*, 67. S. P. Perhaps the case of *Murray* versus *Harding*, 3 *Wilf.* 390. may be cited *è contra*; but there, the court expressly decided upon its being a *purchase*, and not a *loan*. The *grantee* of the annuity having never been spoken to about *lending*.—Lastly, in the case of Lord *Chesterfield* v. *Janssen*, 1 *Atk.* 301. to 355. all the above authorities were weighed and confirmed. Mr. Justice *Burnet* there says *, "If "a man *purchase* an *annuity* at ever such an *under price*, if the "bargain was *really* for an *annuity*, it is *not usury*. If on the "foot of *borrowing* and *lending*, it is *otherwise*; for if the court are "of opinion, the annuity is *not* the *real contract*, but a *method* of "paying *more money* for the reward or interest *than the law allows*, "it is a *contrivance* that shall not avoid the statute, by giving the "avarice of one kind of men, an opportunity of preying on the "necessities of another." And the case put by Lord *Hardwicke*, in giving his opinion upon the same question, is precisely this very case. "A man," says his Lordship, "may purchase an an- "nuity on as low terms as he can: but *if he sets out* with *bor- "rowing* a sum of money, and *then turns it into* the *shape of an "annuity* afterwards, this is a *shift* and an evasion to avoid the "statute." Here, the original application and the subsequent treaty were for a loan, and nothing else. Then the defendant proposes to change it for an annuity. That was a mere shift to evade the statute; the man was in perfect health; little or no chance of his death, so as to create any thing more than a mere colourable risk, and the intention of the defendant was only to avoid the penalty of the law. Therefore, they prayed the rule for a new trial might be discharged.

Mr. *Mansfield contra*, in support of the rule, began by observing upon the testimony of the witness *Heighway*, upon whose evidence alone the transaction rested; and which, he said, was tinctured with very suspicious circumstances indeed. At first, he swore that *Johnson*, who was his partner, was the sole attorney in the cause: That *Johnson* died at *Michaelmas* 1776. Then that *May*, who was clerk to him and his partner, was the *sole* attorney; that he himself was *not* the *attorney*, nor *interested* in the cause. That no steps were taken in the cause during *Johnson's* life, whereas there was a notice of trial and a counter-

* 1 Atk. 330.

mand,

mand, which he must have known. *That* alone, therefore, is a ground for sending the matter to a second enquiry. 2. As to the question of law; it is said, this is not a fair *bonâ fide* communication for the *purchase* of an annuity, but a mere *contrivance* to get more than legal interest. As to that, he said, he agreed, if it were a mere contrivance to get more than legal interest *by way of loan*, it would be usury; for the true distinction certainly is, whether the transaction be real, or colourable only. But if the contract is for a *real* annuity, however unfair or even grossly foul, the bargain may be on the part of the grantee, in taking advantage of the necessities and distress of the grantor, still it will not be usury. What then is the transaction here? Not a *contrivance* to disguise a *loan* under colour of an annuity; but to *force Heighway* into *granting* an *annuity*, when he wanted to have a *loan*. That may be extortion and oppression; but still it is a real annuity, and no loan; consequently, not within the statute. But it is said, there was a communication, and an *absolute agreement* to *borrow*, entered into; and therefore, its being changed into an annuity afterwards will not vary the case: And many authorities have been cited. But (after observing upon them all distinctly) he said, the result of them only proves what is not disputed, that where the transaction really is a loan, the *colour* of an annuity cannot gloss it over. But, though there be a communication for a loan at first, if the *final* agreement is *not to lend*, but for the one, to sell, and the other, to purchase a real annuity, it is not usury: And so it is expressly laid down by Lord *Hardwicke* in 1 *Atkyns*, 351. "The "substance of the agreement, and not the mere expression only, "is to decide." What then is the substance here? The accusation against the defendant is of a promise to lend, and afterwards refusing; but that he had a friend who would let him have the money upon annuity. This, *Heighway* agrees to. Is not that a bargain for a real annuity? For the loan is absolutely refused. The next ground of accusation is, that the defendant promised to *lend* him money to *redeem* the annuity. What? Redeem *that*, which it was understood by both parties *never existed!* Again, *Heighway* repeatedly applies to redeem; and complains because the defendant will not consent. He even pays the annuity from *December* 1770, to *June* 1773, *as an annuity*. All this shews, that in his own mind he was conscious the transaction and agreement was *substantially* a *real annuity*, and *not a loan*. On the other hand, What was the situation of the defendant? He could not have compelled *Heighway* to redeem; for a *liberty to redeem*,

 which

1778. which is all there was in this case, is not a *contract* to redeem. Therefore, if *Waters*'s life had been suspicious, he was at the mercy of *Heighway*, whether the risk should continue or not. Upon the whole, this is manifestly no loan, nor a corrupt bargain for forbearance of the principal money: And there can be no usury by construction. The utmost that could have been done in this case, if the whole transaction had appeared in a court of Equity, would have been for the court to decree that *Heighway* should be permitted to redeem. Therefore, he prayed the rule might be made absolute.

RICHARDS *versus* BROWN.

Lord MANSFIELD.—This is a very considerable question, and I have not quite made up my mind about it: Therefore let it be set down in the paper for special argument, next Term. The question is, Whether the evidence warrants the direction I gave to the jury? Here is Lordship repeated it, (*vide supra*,) and then added, "There are three propositions. 1. The original proposal "was for a loan. 2. The mode of annuity was forced by the "defendant, the lender, upon *Heighway* the borrower. 3. At "the end of three months, *Brown* the defendant promised "to lend *Heighway* money to redeem."—*Adjornatur*.

Accordingly, on this day *, it was argued a second time by Mr. *Hargrave* for the defendant, and by Mr. *T. Cowper* for the plaintiff.

Lord MANSFIELD.—The nature of this question, the importance of it to the public and to the defendant, and tenderness to his character, made me desirous that this motion should be made; though I had no doubt of the propriety of the direction I gave the jury at the trial. We were all satisfied upon the last argument; but wished to have Mr. Justice *Aston*'s public opinion, who, upon a conference with him, entirely agreed with the opinion I shall now deliver, and so did Mr. Justice *Willes*.

The great objection at the trial was to the credibility of *Heighway*'s evidence. As to that, the *facts of the case* could be known only to him and the defendant.—With respect to his concern or interest in the present action, *Heighway* was thoroughly purged on his examination at the trial. The objections to his credit were laboured with all the strength of argument that ingenuity and ability could furnish. The jury had all these observations, without a reply. I said nothing in the summing up, that could weaken the force, or diminish the effect of them. No doubt, the *basis* of the verdict was, *his credibility*; but

* Mr. Justice *Willes* was present at the former argument, but absent upon this.

1778. RICHARDS *versus* BROWN.

that was left to the jury, and they have thought fit to believe him. It is obſervable, that the diſcovery of the truth of the tranſaction was entirely accidental. Upon that, *Brown* conſents to a compoſition, and to accept leſs than the value of the annuity. Why do that, when there was no clauſe of redemption? There are other ſtrong facts. Why make uſe of Mr. *Waters*'s name, if the tranſaction was fair? Why not appear, as he really was, the principal who was to lend the money. Inſtead of which, he appears only as a ſubſcribing witneſs; makes *Heighway* believe *Waters* is the *principal*, who was an utter ſtranger to the whole affair; and under that pretence, takes *procuration-money* for *lending* his *own* money. If the court grants a new trial, it muſt be upon the ground, that *Heighway* ought not to be believed. That was a matter proper for the conſideration of the jury: They had all the objections to his credibility before them, and yet were fully ſatisfied of the truth of what he ſaid.

2. As to the queſtion of law, the facts on which it ariſes are theſe:—Here, his Lordſhip repeated them, together with the direction he gave to the jury, (*vide ſupra*;) and then proceeded as follows: Now the queſtion is, What was the ſubſtance of the tranſaction, and the true intent and meaning of the parties? For they alone are to govern, and not the words uſed. The ſubſtance here was plainly a *borrowing* and *lending*. *Heighway* had no idea of ſelling an annuity; but his declared object was to borrow money, and accordingly he depoſited the declaration of truſt, which was an ample ſecurity for the ſum he wanted. He goes further, and ſays, "rather than not have the money "he would give 20 or 30 *l.* premium for it." *Brown* tells him, it muſt be *by annuity*, that his friend never *lent money* in any other ſhape, and that by that method, he might have it for leſs, (*viz.* 17 *l.* 10 *s.*) as after the firſt quarter he would let him have money to redeem. On the aſſurance that the annuity ſhould be turned into a loan at the end of three months, the treaty proceeds. It comes out, that the defendant himſelf advanced the money. That alters the caſe entirely. If *Waters* indeed had been really the principal, this promiſe of *Brown* would have amounted to no more than a *promiſe to lend* at the end of three months. But *Brown* himſelf being the principal, the promiſe to *lend* him money to *redeem*, muſt be underſtood to be a promiſe to *permit* him to redeem.—It is true, there was a *contingency* during the three months. It was *that*, which occaſioned the doubt; whether a contingency for three months is ſufficient to take it out of the ſtatute. As to that, the caſes

1778.
RICHARDS *versus* BROWN.

have been looked into; and from them it appears, that if the contingency is so slight as to be merely an evasion, it is deemed colourable only, and consequently not sufficient to take it out of the statute. Here, the borrower was a *hale* young man, and therefore we are of opinion, that there was no substantial risk so as to take this case out of the statute.

Rule for a new trial discharged.

Friday, May 15th.

RERY *et al. versus* WHITE, (Lessee of Lady VERE BERTIE,) in Error.

One devises his lands to his brother for life, remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his brother in tail male successively, remainder to his brother's daughters in tail; remainder to his *four sisters* and a *niece* for *their lives, share and share alike, as tenants in common,* and not as joint-tenants Remainder to their sons *successively* in tail, remainder to their daughters in tail; *reversion* to his *own right heirs.* And then devises to another sister, only a small annuity. The *four sisters* and the *niece* take several estates for *life,* with *several remainders* to their sons and daughters *respectively:* And there are no cross remainders. The presumption of law is in favour of raising cross-remainders, between *two* only; and against raising cross remainders between more than two But the presumption in either case, may be *rebutted* by *manifest circumstances of intention,* apparent on the face of the will.

THIS was a writ of error from a judgment of the Court of *King's Bench* in *Ireland,* in an ejectment brought there by the now defendant in error, to recover one undivided fifth part of an estate in the county of *Limerick.*

The jury found a special verdict, stating, "that Sir *Christopher* "*Wray,* being seised in fee-simple of the premises in question, "made his will on the 8th day of *July* 1710, and thereby, gave "*all his lands* to his brother *Cecil Wray,* for life, remainder to "trustees to preserve contingent remainders; remainder to the "first and every other son of the said *Cecil Wray* in tail male, "successively; remainder to his daughters in tail; remainder to "his *four* sisters, *Bridget Howard, Elizabeth Fitzgerald, Frances* "*Wray, Diana Twigge,* (afterwards *Diana Pery*), and a niece "of the name of *Mary Kerr,* for their *lives,* share and share "alike, as *tenants in common,* and not as joint-tenants; remain-"der to their sons successively in tail male; remainder to their "daughters in tail; the reversion to his own right heirs." Sir *Christopher Wray* died the same day, leaving his brother the said *Cecil Wray,* (then Sir *Cecil Wray,*) his heir at law, his sisters the devisees, and another sister, *Mary Whitaker,* for whom he made no provision except a small annuity. Sir *Cecil Wray,* the brother, entered and made his will, and thereby disposed of his estate to Lady *Ann Bertie,* under whom the defendant in error claimed, and died without issue. All the sisters, and the niece of Sir *Christopher,* died in the lifetime of Sir *Cecil,* except *Diana Pery,* who left two daughters, *Jane Pery,* and *Ann Mansell* one of the plaintiffs in error. That *Jane Pery* is since deceased, leaving issue of her body *Edmund Pery,* her eldest son and heir at law,

the

the other plaintiff in error. That on the death of *Mary Kerr*, who left no issue, the said *Edmund Pery* and *Ann Mansell* entered upon her undivided fifth part, (the premises in question,) and were seised thereof. That the said *Jane Pery* and *Ann Mansell* are now the heirs at law of Sir *Christopher*, and also of the said Sir *Cecil Wray*.—Upon this special verdict, judgment was given in *Ireland* for *White*, the plaintiff in ejectment there, now the defendant in error. The question was, "Whether, under the will of Sir *Christopher Wray*, the plaintiffs in error were entitled to the inheritance of the whole of the estate, and of course, to the fifth part in dispute? or, Whether it should go to the defendant in error, claiming it under the will of Sir *Cecil Wray* the heir at law, and reversioner in fee of Sir *Christopher*?

1778.

PERY *et al.* *versus* WHITE.

Serjeant *Hill*, for the plaintiffs in error, argued, that, in the event which had happened, they were entitled to the inheritance of the whole estate. 1. Upon the clear intention of the testator collected from the whole of the will taken together. 2. Supposing the intention of the testator to be doubtful, the legal operation of the words of the will were alone sufficient to carry the whole estate to them.—Upon the *first* ground, he took notice of the circumstances of the family at the time the will was made; that the objects of the testator's bounty, were his own brother in the first instance, and *his* family; in the next, four out of five of his sisters, and their families; for, *Mary Whitaker*, the *fifth* sister, was to be *excluded*. That in the mode of entailing the estate, he had followed the common course of family settlements: In the first instance, giving the estate to his brother *for life*, remainder to trustees, to preserve contingent remainders, (which words he contended would go to all the other remainders, if it were necessary to argue it,) remainder to his first and other sons *successively in tail male*. Remainder to his daughters *in tail*, (omitting the words "successively" and "*male*"), remainder to his sisters and niece *Mary Kerr* for their lives, share and share alike, as tenants in common, and not as joint-tenants. Remainder *to their sons* successively in tail, remainder to their daughters in tail; reversion to his own right heirs. It was clear, therefore, from this disposition, that he meant his family estate should go *entire* to his family. If his brother had had only one daughter, she would have taken the whole: So, if one of the sisters only had had a daughter, that daughter would have taken the whole. But if,

1778. in the event which had happened, the share of the deceased sister were to go to the heir or heirs at law, the consequence would be, that every one of the surviving sisters, of which there were four, would take a share. So that their situation would be this; each would become tenant in *fee-simple* of a *twentieth part*, while she continued tenant in *strict settlement* only, of her own original *fifth* part. It was extremely clear therefore, from the words of the will, and still more from the general design of it, (by which it was apparent that *Mary Whitaker* was to be excluded,) that the principal object of the testator was, to have his family estate go entire to the *devisees*. But 2dly, He argued, that supposing this had not been a will, but a deed of conveyance to uses, where the intent would be out of the question, even in that case the words would support the construction he contended for; and by legal operation pass the whole estate to the plaintiffs in error. For, by the terms of the devise, the daughters of the sisters take by way of description, as purchasers in their own right; it being an established rule of law, that wherever there is a limitation, with a remainder to several persons not *in esse*, the first person who comes *in esse* shall take the whole, subject to its being devested, in proportion to the shares of any other persons who shall come *in esse*, before the determination of the particular estate. *Bac. Law Tracts*, 351. 1 Ld. *Raym.* 311. S. P. By the common law, independent of the statute of uses, where there was a conveyance to many, and only one *in esse* or capable, such person took the whole. *Perkins*, *sect.* 204. It may be objected, however, that this devise to the testator's sisters and niece for life, remainder, *&c.* ought to be construed *reddendo singula singulis*; and that the daughter of each should only take their mother's share: But that would be an arbitrary insertion of words, contrary to the plain intention of the testator. The word "daughters" is never a word of limitation, but a word of purchase; and therefore, if only one sister had had a daughter, and the other three sisters had died without issue, the daughter of the surviving sister would have taken the share of the other three, in her mother's life-time. And he cited *Weld* versus *Bradbury*, 2 *Vern.* 705. *Bateman* versus *Roach*, 9 *Mod.* 104. *Brookes* versus *Taylor*, 8 *Vin.* 313.

PERY *et al.* *versus* WHITE.

Mr. *Dunning*, *contra*, contended, that it was impossible, in the event which had happened, not to construe the remainder to the daughters of the sisters, *reddendo singula singulis*. The devise to the

the parents, is to them as *tenants in common* for life, which is an *actual division of a fifth to each*; the remainder to the sons, follows immediately after, and is to them "*successively*," which is as strong as if it had been limited to them "respectively;" and then follows the devise to the daughters. So that the estates are as distinct as language can make them. Therefore, he prayed the judgment might be affirmed.

1778. PERY et al. versus WHITE.

Lord MANSFIELD.—There have been many cases upon cross remainders by implication; and I take the rule settled by them to be this: That wherever cross remainders are to be raised by implication between *two*, and no more, the *presumption* is in *favour* of cross remainders; where they are to be raised between *more* than *two*, there the presumption is *against* cross remainders: But that presumption may be answered by circumstances of plain and manifest intention either way. This is a qualification of the rule laid down in former cases; for they seem to say, that there shall *not* be cross remainders between more than two. Lord *Hardwicke*'s authority leant a good deal that way; and so do the cases of *Comber* v. *Hill**, *Williams* versus *Brown*†, and some others. But the true rule is, to take it with the qualification I have stated. Here, the presumption is against cross remainders. The question therefore is, Whether there are circumstances of intention sufficient to destroy that presumption. The circumstances relied on, are *two*. 1. That one sister, upon the death of her brother Sir *Cecil*, without issue, male or female, and who till then could take nothing at all, would be a co-heiress with the rest of her sisters; and, though not an object of the testator's bounty, would, upon the decease of either of them, come in for a share of her fifth part: and, therefore, the reversion given by the testator to his right heirs, was not intended to take place till a failure of issue of all the other sisters. The other circumstance is, that supposing cross remainders are not implied, the other sisters would take the accruing share as survivors in *fee*, while they had their original share only in tail; and that is contrary to the intention of the testator. This, I think, is the amount of all that the ingenuity of the counsel has been able to suggest. The answer to it is this: That the reversion to the right heirs of the testator, is barely after all the other estates are disposed of; and his heir at that time, was his brother. He might give him a general

* 2 *Str.* 969. † 2 *Str.* 996.

reversion

1778. reversion in fee after all these remainders. But the construction that is contended for, suggests to me the strongest argument upon the words of this will, to say, that the word "*respectively*" is supplied by synonimous expressions. For how is the estate given? It is given to the four sisters and the niece during their lives, share and share alike, as tenants in common, "and not as "joint-tenants." Why then, during their lives, there is a division; each is to have a fifth for life, to enjoy in severalty. Then follows, "the remainder to their sons successively" in tail. What is the meaning of the expression "their sons?" It is impossible to construe it otherwise than "*respectively*," that is, remainder of the share of the sister dying, to her sons successively, remainder to *her* daughters, as coparceners; and then the reversion to the right heirs: that is, the reversion of the share of the several tenants for life and their issue respectively. It is absurd to say, that the children of the other sisters should take the share of the deceased sister, as purchasers in the life-time of their mother. Therefore, I am of opinion the judgment should be affirmed.

PERY *et al.* *versus* WHITE.

Mr. Justice *Buller* cited the case of *Miller* v. *Moore*, adjudged about the year 1740, which he said was taken notice of by *Aston* Justice, in the case of *Doe ex dim. Burden* v. *Burville* as a case that had settled the rule respecting cross remainders by implication.

Per Cur. Judgment affirmed.

Same day.

M'LEISH *versus* TATE.

THIS came before the court upon a case reserved at the last *Lent* assises, at *Kingston*, before Mr. Justice *Blackstone*, stating in substance as follows:—"In replevin, the plaintiff "declared against the defendant, for taking several of his goods "and chattels, in certain places called the chalk-pit, *&c.*" The defendant avowed the taking, because the plaintiff and *Samuel Meeke* (his partner) enjoyed the said chalk-pit from *Midsummer* 1775, to *Michaelmas* 1775, at the rent of 15 *l.* for that quarter, and the said chalk-pit and other the premises, from *Michaelmas* 1775, to *Michaelmas* 1777, at the rent of 100 *l.* *per annum*, and because the said rents were in arrear, *&c.* The plaintiff traversed that he and the said *Samuel Meeke* enjoyed the

ſaid chalk-pit, and other premiſes under the demiſe in the avowry mentioned, and thereupon iſſue was joined. At the trial it appeared, that the plaintiff and the ſaid *Samuel Meeke*, at *Midſummer*, 1775, got poſſeſſion of the chalk-pit in queſtion, under an agreement with Mr. *Shrubb*, attorney or agent for the defendant, at the rate of 20 *l.* a-year: and at *Michaelmas*, 1775, by agreement with *William Horſenell*, tenant to the defendant, they alſo came into poſſeſſion of the other three fields, upon certain terms, both which agreements were ſubject to the approbation, or otherwiſe, of the defendant and his wife, who were then abroad. On their return to *England*, after many tranſactions, it was agreed on the 26th of *November* 1776, between the ſaid *Samuel Meeke* and *David James*, agent for the defendant, that a leaſe ſhould be drawn of the whole premiſes, for ten years from *Michaelmas* 1775, at 100 *l.* a-year rent, with the uſual covenants; and that the ſaid plaintiff and *Samuel Meeke* ſhould pay 15 *l.* for the chalk-pit, from *Midſummer* to *Michaelmas* 1775, and *Meeke* then paid 57 *l.* 10 *s.*: and a receipt or memorandum was given by the ſaid *David James*, and ſigned by him and the ſaid *Samuel Meeke*, in the words and figures following: "Received 26th *November* 1776, of *Samuel Meeke*, Eſq; the "ſum of 57 *l.* 10*s.* in part and on account of 115 *l.* for ſo much "rent agreed to be due from him and Mr. *M'Leiſh*, at *Michaelmas* "laſt, for a chalk-pit and lands ſituate, &c."—*No leaſe* was ever *executed*, although a draught of the leaſe for nine years from *Michaelmas*, 1776, was made, and left with the ſaid *Samuel Meeke*, by the defendant's agent.—A verdict was found for the plaintiff, with 1 *s.* damages, and 40 *s.* coſts, ſubject to the opinion of the court upon the following queſtions:—Firſt, Whether the ſum of 15 *l.* for the quarter ending at *Michaelmas*, 1775, is to be conſidered as a rent under the demiſe mentioned in the avowry? Secondly, Whether the agreement for the ten years' leaſe, under the circumſtances aforeſaid, was good under the ſtatute of frauds?

Mr. *Peckham* for the defendant argued, that the proceedings in avowry are favoured by law; and the ſame ſtrictneſs not neceſſary as in a declaration. To this purpoſe he cited *Macdonnel* v. *Weldon*, *Trin.* 8 *Geo.* 1. *B. R.* 1722, and *Richards* v. *Cornforth*, 2 *Salk.* 580. in which latter caſe it was held, "that "upon an avowry for *more rent* than was *due*, if the avowant had "abated the ſurplus before judgment, it would have been good "*pro tanto*." The ſtat. 11 *Geo.* 2. *c.* 19. has alſo, in aid of

avowants,

1778.

M'Leish *versus* Tate.

avowants, chalked out the line they are to purſue, and the defendant has here followed it. The firſt queſtion is, Whether the 15*l.* rent due at *Michaelmas*, is to be conſidered as a rent under the demiſe? As to that, though the rent reſerved under the firſt agreement for the chalk-pit, was only 20 *l. per ann.* yet both were ſubject to the approbation of the defendant; and the part payment of the rent was under the *ſecond*, which the defendant had approved of. The 2d queſtion is, Whether the agreement for a ten years' leaſe, is good under the ſtatute of frauds, not being reduced into writing? As to that, it has been frequently decided, that where the agreement is confeſſed, or part executed, it is good, though not reduced into writing. *Croyſton* verſus *Banes*, *Prec.* in *Canc.* 208. *Moore* v. *Hart*, 1 *Vern.* 110. *Butcher* verſus *Stapely*, *et al. Ibid.* 363. *Lacon* v. *Martyns*, 3 *Atk.* 1. Here the agreement is both confeſſed, and in part executed by each, by the payment and acceptance of rent in part. Therefore, he prayed judgment for the defendant.

Mr. *Rous*, *contra*, for the plaintiff contended, that notwithſtanding the ſtat. 11 *Geo.* 2. it is *c.* 19. ſtill neceſſary for the avowant, to ſpecify the particular demiſe under which he claims, and the rent reſerved. But moſt clearly, the eſſential requiſite to entitle him to recover, namely, that the rent diſtrained for ſhould exiſt at the time of the demiſe, continues the ſame as before the ſtatute. It muſt *grow out of the contract*. But here, the caſe ſtates, that the plaintiff came into poſſeſſion of the chalk-pit under a rent of 20*l. per ann.*: whereas, the demiſe ſtated in the avowry, is at the rate of 15 *l.* for one quarter; which is a totally different contract. But ſuppoſing the plaintiff did agree to the rent reſerved in the ſecond agreement, it was upon condition of a ten years' leaſe, which is not executed; therefore, the conſideration fails. 2. There has been no part execution of the agreement for a leaſe, as contended on the other ſide; for the receipt given by *James*, does not ſpeak of the rent paid, as rent reſerved under the intended demiſe. Nor could there poſſibly be a part execution in any ſenſe of the phraſe; becauſe the poſſeſſion was under a different agreement. Therefore he prayed judgment for the plaintiff.

Lord MANSFIELD.—It is very plain what the juſtice of the caſe is: It is that the leaſe ſhould be executed. The only material fact is, Whether the defendant is ready to execute it, and the plaintiff diſſents. It is clear the plaintiff has held at a rent: It is as clear that he has agreed to let that rent be 15 *l.* from *Mid-*

ſummer

summer to *Michaelmas*. At the same time, there were other stipulations to be performed on the part of the defendant, and therefore he says, he ought not to be bound by what he has agreed to, unless the defendant will perform his part. But the answer given to that is, that the defendant is ready to perform the whole of it. The first agreement is out of the question. The real justice of the case is, that the lease should be executed. Therefore let it be added to the case, which party is backward to execute it.

Adjornatur.

An affidavit was accordingly made, stating that the defendant was, and is ready to execute the lease in question, a draught of which was in the plaintiff's possession; but that the plaintiff, without objecting to the terms of it, refused, and still refuses, to accept it.

The court upon the 1st point, held this a demise at a rent certain, for that the subsequent agreement should by relation operate to make it a reservation of the rent from the beginning

Judgment for the defendant

HORE *versus* WHITMORE.

Saturday, May 16th.

If a ship *warranted* to sail on or before a particular day, be prevented from sailing on the day by an embargo, the warranty is not complied with.

THIS came before the court upon a rule to shew cause, why the verdict given for the plaintiff in this case should not be vacated, and judgment entered for the defendant, as in case of a nonsuit. The declaration stated, that upon a policy of insurance on the ship *New Westmoreland*, at and from *Jamaica* to *London*, *warranted* to sail *on* or before *the 26th* of *July* 1776, free from capture, and from all *restraints and detainments of kings, princes*, and people of what nation, condition, or quality soever, the said ship was preparing and ready to sail, and would have sailed on the 25th of *July*, on her intended voyage, if she had not been restrained by the order and command of Sir *Basil Keith*, the then governor of *Jamaica*, and detained beyond the day. That she afterwards sailed, and was captured, &c.

Mr. *Wallace*, who shewed cause, objected, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo by which the ship was prevented from sailing on the day mentioned in the warranty, came expresly within the meaning of it; and therefore excused the delay.

Mr.

1778.

Horne *versus* Whitmore.

Mr. *Dunning*, *contra*, contended that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was positive and express, that the ship should depart on or before the day appointed, and therefore, must be complied with. And of this opinion was the court. Accordingly, the rule for the nonsuit was made absolute.

Saturday, *May* 16th.

Pawson *versus* Watson.

A *warranty* inserted in a policy of insurance, must be *literally* and *strictly* complied with.—A *representation* to the underwriter, need only be *substantially performed*. But if *false* in a *material* point, it will avoid the policy.

UPON a rule to shew cause why a new trial should not be granted in this case, Lord *Mansfield* reported as follows. This was an action upon a policy of insurance. At the trial it appeared in evidence, that the *first* underwriter had the following *instructions* shewn him: "Three thousand five "hundred pounds upon the ship *Julius Cæsar*, for *Halifax*, to "touch at *Plymouth*, and any port in *America*: She mounts "12 guns and 20 men." These instructions were not asked for or communicated to the defendant; but the ship was only represented *generally* to *him*, as a *ship of force*: And a *thousand pounds* had been done, before the defendant did any thing upon her. The instructions were dated the 28th *June* 1776, and the ship sailed on the 23d *July* 1776; and was taken by an *American* privateer. That at the time of her being taken, she had on board 6 *four pounders*, 4 *three* pounders, 3 *one* pounders, 6 *half* pounders, which are called *swivels*, and 27 men and boys in all, for her crew; but of *them*, 16 only were *men*, (not 20, as the instructions mentioned,) and the rest, boys. But the witness said, he considered her as being stronger with this force, than if she had 12 carriage guns and 20 men: He also said, (which is a *material* circumstance,) that *there were neither men nor guns on board, at the time of insurance*. That he himself insured at the same premium, without regard or enquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a *ship of force*. That to every *four* pounder there should be *five* men and a boy. That in merchant ships, boys always go under the denomination of men.—This was met by evidence on the part of the *defendant*, saying, that guns mean *carriage* guns, not *swivels*, and men mean *able men* exclusive of boys. There were three causes of the same nature*, depending upon the same

* The names of the other two causes were *Pawson* v. *Snell*, and *Pawson* v. *Ewert*

evidence:

evidence: The defence in each was, that these instructions were to be considered as a *warranty*, the same as if they had been *inserted in the policy;* though they were not proved to have been shewn to any but the first underwriter. In all the three cases, the question reserved for the opinion of the court is, "Whether "the written instructions which were shewn to the first under-"writer, are to be considered as a warranty inserted in the policy, "or as a *representation*, which would only avoid the policy, if "fraudulent?" If the court should be of opinion, that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs; otherwise, the verdicts are to stand.

At the trial I was of opinion, that it would be of very dangerous consequence to add a conversation that passed at the time, as part of the written agreement. It is a collateral representation: And if the parties had considered it as a warranty, they would have had it inserted in the policy. But secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both *material* and *fraudulent*: And in that light, I held, that a misrepresentation made to the first underwriter, ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: For where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud. The case was left to the jury under that direction.

Mr. *Wallace*, who shewed cause, insisted that the instructions in question were no warranty, but a *representation*. That the policy is the formal instrument containing the final agreement of the parties; and therefore no instructions, parol or *written*, can be admitted to contradict it. 2. With respect to its being a *fraudulent* misrepresentation, the evidence proved, and the jury by their verdict found there was no fraud. On the contrary, the terms of the representation were more than complied with: For by the evidence it clearly appears, that the force actually on board, exceeded the force specified in the instructions. Therefore, he prayed the rule might be discharged.

Mr. *Mansfield*, Mr. *Macdonald*, and Mr. *Davenport*, *contra*, in support of the rule, contended, that the instructions in question, being contained in the same paper as that which named the ship and captain, were the *basis* of the agreement between the

1778. the parties; therefore, moſt clearly to be conſidered as a warranty: Without it, there was no agreement at all. There was no ſhip, no ſubject upon which the policy could attach. If not intended as the foundation and ground of the inſurance, why write down a ſpecific force? Why not ſtate only, that ſhe was a ſhip of force *generally*, unleſs that the real force ſhe was to carry might be correctly underſtood? If there is a writing, whether inſerted in the inſtrument or in any collateral paper, or whether a warranty technically ſo called or not, makes no difference. It is equally the baſis of agreement between the parties; therefore in ſtrictneſs, it ought to be complied with. Suppoſe there had been *no* guns at all, could the plaintiff have recovered in that caſe? Yet evidence of that, would have been as much a contradiction to the policy, as this, for no mention is made of guns in the policy. Or, ſuppoſe it had been written in the margin of the policy, could the policy have ſtood? Clearly it could not.—With reſpect to the neceſſity of the repreſentation being *material*, as well as fraudulent, whether material or not does not depend upon the opinions of particular perſons upon the particular caſe in queſtion; but whether the *ſubject* itſelf is, in its *nature* material. If the ſhip had been deſcribed to be of a particular colour, clearly that would have been no engagement, becauſe in its nature immaterial. But *guns* in time of war are in their own nature material; and indeed of the very eſſence of a policy: For the premium is regulated accordingly. It is not enough to ſay, that in the opinion of two or three perſons, the force actually on board was *equal*. The inſurer alone is to be the judge of that. But that is not the point. Whether ſhe was in a better or worſe ſtate, the underwriter has a right to ſay, the truth of the caſe is not according to what I bargained for, and therefore there is no contract between us. Upon theſe grounds they prayed the rule might be made abſolute.

PAWSON *verſus* WATSON.

Lord MANSFIELD aſked, Whether there was any caſe that made a difference between a written and a parol repreſentation? Upon receiving no anſwer, his Lordſhip proceeded to give his opinion as follows:——There is no diſtinction better known to thoſe who are at all converſant in the law of inſurance, than *that* which exiſts, between a *warranty* or condition which makes part of a written policy, and a *repreſentation* of the ſtate of the caſe. Where it is a part of the written policy, it muſt be performed: As if there be a warranty of convoy, there it muſt be a *convoy*: Nothing tantamount will do, or anſwer the purpoſe; It muſt be

be ſtrictly performed, as being part of the agreement; for there it might be ſaid, the party would not have inſured without convoy. But as, by the law of merchants, all dealings muſt be fair and honeſt, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a repreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the ſame time he is ill of a fever, that will not avoid the policy; becauſe by the warranty he takes the riſk upon himſelf. But if there is no warranty, and he ſays, "the "man is in good health," when in fact he knows him to be ill, it is *falſe*. So it is, if he does not know whether he is well or ill; for it is equally falſe to undertake to ſay that which he knows nothing at all of; as to ſay *that* is true, which he knows is not true. But if he only ſays, "he believes the man to be "in good health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the underwriter *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction, than that which exiſts between a warranty which makes part of the written policy, and a collateral repreſentation, which, if falſe in a point of materiality, makes the policy void: but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy, parol inſtructions were never entered in a book, nor written inſtructions kept, till many years ago, upon the occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought not to have repreſented, in conſequence of which the plaintiffs were caſt; I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly, at *Guild-hall*, cautioned and recommended it to the brokers, to enter all repreſentations made by them in a book. That advice has been followed in *London*: But it appeared lately, at the trial of a cauſe, that, at *Briſtol*, to this hour, they make no entry in their books, nor keep any inſtructions.

The queſtion then is, "Whether in this policy, the party "inſuring has *warranted* that the ſhip ſhould *poſitively* and *literally* "have *twelve carriage guns* and *twenty men?*" That is "Whether "the inſtructions given in evidence are a part of the policy?" Now, I will take it by degrees. The two firſt underwriters before the court, are *Watſon* and *Snell*. Says *Watſon*, "it is part of my

1778. "agreement, that the ſhip ſhall ſail with twelve guns and twenty "men; and it is ſo ſtipulated, that nothing under that number "will do. Ten guns with ſwivels will not do." The *anſwer* to this is, "read your agreement; read your policy." There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions upon which the policy was made, contain that expreſs ſtipulation. The anſwer to that is, there never were any inſtructions ſhewn to *Watſon*, nor were any aſked for by him. What colour then has *he* to ſay, that thoſe inſtructions are any part of his agreement. It is ſaid, he inſured upon the credit of the firſt underwriter. A *repreſentation* to the firſt underwriter, has nothing to do with that which is the agreement, or the terms of the policy. No man who underwrites a policy, ſubſcribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, and is governed by that. Matters of intelligence, ſuch as that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement, which he can know nothing of. The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to the firſt underwriter, and makes a *falſe repreſentation* to him in a point that is *material*; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all the ſubſequent underwriters, who are preſumed to follow the firſt. How then do *Watſon* and *Snell* underwrite the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt one—eight guineas.—So much therefore for thoſe two caſes. The third caſe is that of *Kwer*, who ſaw the inſtructions, with the repreſentation which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have ſaid "put "them into the policy; warrant that the ſhip ſhall depart with "twelve guns and twenty men." Whereas, he does no ſuch thing, but takes the *ſame premium* which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ſhip of no force at all.—The repreſentation amounts to no more than this, "I tell you what the force will be, becauſe it is ſo "much the better for you." There is no fraud in it, becauſe it is a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth, the ſhip ſailed

PAWSON *verſus* WATSON.

with a *larger* force: For she had *nine* carriage guns, besides six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal should be. All the witnesses say, "she had more force "than if she had had twelve carriage guns, both in point of "strength, of convenience, and for the purpose of resistance." The supercargo in particular says, "he insured the *same ship* and "the *same voyage*, for the *same premium*, without saying a syllable "about the force." Why then it was a matter proper for the jury to say, Whether the representation was false? or Whether it was in a fact an insurance, as of a ship without force? They have determined, and I think very rightly, that it was an insurance without force.—*Ewer* makes an objection that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference, whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. *Thornton* has paid, who was the first person that saw the instructions. Shall the rest refuse then? As to *Watson* and *Snell*, they have no pretence to refuse, for there is not a colour for the objection made by them. As to *Ewer*, we are all satisfied with the determination of the jury against him. Therefore, the rule for a new trial must be discharged.——*N. B.* On the *Monday* following, Mr. *Davenport* said, he was desired by the underwriters to ask, Whether it was the opinion of the court, that to make written instructions valid and binding as a warranty, they must be inserted in the policy? Lord *Mansfield* answered, that most undoubtedly that was the opinion of the court.—If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy.

BROWNING *versus* MORRIS.

Monday, May 18th.

Money paid by the *insurer* or *lottery-office-keeper*, in consequence of having insured the defendant's tickets, cannot be recovered back. But the premiums of insurance, paid by the *insured*, to the lottery-office-keeper, may.

UPON shewing cause why the verdict found in this case, for the plaintiff, should not be vacated, and a nonsuit entered in its stead; Lord *Mansfield* reported in substance as follows: This was an action for *money had and received*. The plaintiff

and

1778. and defendant were both lottery-office-keepers; and during the drawing of the lottery, entered into an agreement mutually to insure the number of a ticket with each other, upon condition, that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it at the market price. The defendant's number being drawn, he chose the price of an undrawn ticket, which came to 14*l.* 3*s.* and received that sum from the plaintiff. The next day, each insured another number upon the same terms. And so the contract was continued from day to day. It afterwards happened, that the plaintiff's number was drawn; when the defendant, instead of complying with the terms of the agreement as the plaintiff had done, refused to give the plaintiff either an undrawn ticket or the value of it. Neither of them had any tickets in their possession, the consequence of which is, that the contract was illegal, and against the statute. The question is, Whether the plaintiff is entitled, in disaffirmance of the contract, to recover back the sum which he has paid upon this illegal transaction?

BROWNING *versus* MORRIS.

This case was argued on *Saturday, May* 18th, in this term.—Mr. *Wallace*, who shewed cause, argued, that the plaintiff in this case, was in the same situation as a person who has paid usurious interest upon a corrupt and illegal contract, for which an action for money had and received will clearly lie. That the stat. 17 *Geo.* 3. *c.* 46. by which this species of contract is prohibited, imposes the penalty only on the *insurer*, which the defendant was in this case, and *not* on the *insured*; and cited the case of *Jaques* versus *Golightly, Pasch.* 16 *Geo.* 3. *C. B.* where, it was adjudged, that a person who had paid a lottery-office-keeper several sums of money, as the premium for insuring a number of tickets, was entitled to recover them back*.

Mr. *Dunning, contra*, for the defendant, contended, that, though the plaintiff could not have been compelled to pay the defendant the money in question, the contract being declared void by the statute, yet having once paid it, where in justice and good faith it was due, he could never have the assistance of an action for money had and received, which is an equitable action founded in conscience, to recover it back. This point did not occur in *Jaques* v. *Golightly*, in the *Common Pleas*. The sole ground of determination in that case was, that the plaintiff was not *particeps criminis*. But my objection is, that the money being

* *Vide* this case since reported, in 2 *Blackst.* 1,073.

conſcientiouſly due in *honour* and *honeſty*, and *paid* to the defendant, cannot be recovered back; and ſo it is expreſsly laid down in *Moſes* verſus *Macfarlane*, 2 *Bur.* 1,012. So, money fairly loſt at play, money paid for the price of ſmuggled goods, are not recoverable in an action for money had and received. The contract is *executed*; and *potior eſt conditio defendentis.* 1778.

Browning *verſus* Morris.

Cur. adviſare vult.

Lord *Mansfield*, on this day, delivered his opinion as follows: The rule is, *in pari delicto, potior eſt conditio defendentis:* And there are ſeveral other maxims of the ſame kind. Where the contract is executed, and the money paid in *pari delicto*, this rule, as Mr. *Dunning* contended, certainly holds. And the party who has paid it, cannot recover it back. For inſtance, in *bribery*, if a man pays a ſum of money by way of a bribe, he can never recover it in an action; becauſe both plaintiff and defendant are *equally criminal.* But, where contracts or tranſactions are prohibited by poſitive ſtatutes, for the ſake of protecting one ſet of men from another ſet of men; the one, from their ſituation and condition, being liable to be oppreſſed or impoſed upon by the other; *there*, the parties are *not in pari delicto*; and in furtherance of theſe ſtatutes, the perſon injured, after the tranſaction is finiſhed and completed, may bring his action and defeat the contract. For inſtance, by the ſtatute of uſury, taking more than 5 *per cent.* is declared illegal, and the contract void; but theſe ſtatutes were made, to protect needy and neceſſitous perſons from the oppreſſion of *uſurers* and monied men, who are eager to take advantage of the diſtreſs of others; whilſt they, on the other hand, from the preſſure of their diſtreſs, are ready to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore, the party injured may bring an action for the exceſs of intereſt. Another inſtance that occurs to me is, the clauſe in the ſtat. 5 *Geo.* 2. *c.* 24. *ſect.* 17. to prevent bad practices upon bankrupts, who have not obtained their certificate; and who, for the ſake of obtaining it, will come into any terms, and cauſe their friends to come into any terms, which a hard creditor may chuſe to impoſe. The ſtatute prohibits "taking any money or ſecurity "from the bankrupt himſelf, or any perſon on his behalf, "as the *conſideration* for *ſigning his certificate.*" Suppoſe a creditor refuſes, unleſs the bankrupt conſents to give him a ſum of money. The bankrupt gets the money from a friend or relation, and the creditor, in conſequence, ſigns the certificate.

1778. BROWNING *versus* MORRIS.

tificate. The bankrupt renews his trade, and receives every advantage he can derive from having obtained his certificate. He may notwithstanding bring his action and recover the money back. And this, though he has acted contrary to a law made for his own benefit*. This brings the present case within the determination of *Jaques* v. *Golightly*, in *C. B.* For in that case the Chief Justice said, "the statute is made to protect the ignorant and deluded multitude, who in hopes of gain and prizes, "and not conversant in calculations, are drawn in by the office-"keepers." And it is very material, that the statute itself, by the distinction it makes, has *marked* the *criminal*: For the penalties are all on *one* side; upon the *office-keeper*. The man who makes the contract is liable to no penalty. So in usury, there is no penalty upon the party who is imposed upon. It is true, that in these cases, the court will not assist the party who makes the illegal contract to recover any money he may win of the office-keeper; but he shall have his action for all the money which the office-keeper has got from him.

After Lord *Mansfield* had proceeded thus far, it occurred that the plaintiff was himself a lottery-office-keeper, and brought his action, not for money paid by him to the defendant for insuring; but for money paid by him to the defendant in consequence of his having insured the defendant's tickets. So that the plaintiff was not only *in pari delicto*, but also stood in the light and under the description of that species of insurer, from whom the statute meant to protect the unwary.

And the court were finally of this opinion (allowing the determination of the *Common Pleas* to be right) and accordingly

A nonsuit was entered.

* *Vide* Smith v. Bromley, *Dougl. Rep.* 670. *n.*

Same day.

JESTONS *versus* BROOKE.

A. in consideration of advancing 45 *l.* for which he takes the borrower's note of hand, *payable on demand*, stipulates to have *half of the profits* upon a *re-sale* of certain goods intended to be purchased by the borrower with the money; *two hours* after the purchase, *A.* demands payment of the note; and the same night puts a person into possession jointly for himself and the borrower. —The neat profits upon a re-sale were 5 *l.*——The bargain is *unconscionable*; and therefore, *A.* shall not recover his share of the profits in an *action for money had and received.*

THIS was an action for "*money had and received*:" And, upon a rule to shew cause why the verdict obtained for the plaintiff should not be set aside and a nonsuit entered in its stead, Lord *Mansfield* reported as follows:—The plaintiff and defendant were both *brokers*: The defendant wanted to purchase a parcel

a parcel of goods, which had been diſtrained for rent: but had no money. He applied therefore to the plaintiff; who, on the 12th of *November* 1777, lent him 45*l.* upon his note of hand, *payable on demand.* At the *ſame time* it was agreed, that the plaintiff ſhould have *half of the neat profits*, which ſhould be made of the goods upon the re-ſale of them, *over and above the note of hand. Two hours* after the ſale, *payment* of the note of hand was *demanded* by the plaintiff, in order to force the defendant to ſell the whole of the goods to him; and, as an inducement, the plaintiff offered him 3*l.* profit, which the defendant refuſed; and ſold the goods afterwards for 5*l.* profit. The plaintiff paid the 45*l.* to the landlord by the direction of the defendant, and put a man into poſſeſſion on the night of the ſale. The note was repaid on the 21ſt of the ſame month. This action was brought for 2*l.* 10*s.* the half of the neat profits for which the goods were re-ſold.—Towards the end of the cauſe, it ſtruck me, that this contract was uſurious on the part of the plaintiff; becauſe he was to have *half of the profits*, and was to *run no riſk*. The jury found a verdict for the plaintiff, ſubject to the opinion of the court, upon the queſtion, Whether this contract was uſurious, or not? If the court ſhould be of opinion, that it *was*, then the verdict was to be ſet aſide, and a nonſuit entered in its ſtead.

Mr. *Wallace*, in ſupport of the verdict, argued, that this was not an uſurious contract. 1. Becauſe there was no *certainty* upon the original agreement of *any intereſt* beyond 5 *per cent.*; but the whole reſted in contingency, upon what would be the neat profits ariſing from the *re-ſale of the goods*; and if there had been *no profit at all*, the plaintiff would have had *no intereſt whatever*. It is true a *mere colourable contingency* will not aid a contract, where by the very terms of the agreement uſurious intereſt is reſerved; but in the preſent caſe, it could not be known what the profits of the ſale would be; it depended upon the defendant's meeting with a good purchaſor; and, upon the money being collected in. It might happen, that the goods ſhould ſell at a loſs. The contingency therefore was *real, not colourable* only: Conſequently, not within the ſtatute. 2. To make a contract uſurious, illegal intereſt muſt be reſerved by the very terms of the contract: Whereas in this caſe the note of hand given by the defendant bore no intereſt at all. Therefore he prayed the rule might be diſcharged.

1778. Mr. *Howorth*, *contra*, in support of the rule, insisted, that the transaction was clearly usurious. All that is essential to make a contract usurious is, that it should be for a *loan*, with a *reservation* of *more* than 5 *per cent.* interest, for *forbearance* of the *principal*. Here the principal was secured by a note of hand, *payable on demand:* Consequently, the plaintiff run no risk. In addition to this the plaintiff at the same time stipulates for *half of the neat profits* upon a re-sale of the goods; which, it appears, far exceeded the rate of legal interest. It is material too in this case, that the plaintiff who had viewed the goods must, from his occupation, necessarily have known what they were fairly worth. If the contract is a loan, and the intention is to get more than legal interest, no shift or contrivance can take it out of the statute. A contract is not less usurious, because no interest is reserved upon the sum advanced; if something also, as a *horse*, &c. the value of which exceeds the legal rate of interest, is substituted in its stead. Therefore he prayed a nonsuit might be entered.

JESTONS *versus* BROOKE.

Lord MANSFIELD.—This is an action for *money had and received;* and therefore it is analogous to a bill in equity. The ground of the action is, to recover half of the neat profits arising by the re-sale of certain goods purchased by the defendant as stated in the report. The general question is, "Whether the plaintiff "ought to recover in an action for *money had and received?*" That is, "Whether it is *against conscience* that the defendant should "retain the *whole* profits of the goods in question to himself?" There are two grounds, either of which is an answer to the action. 1. If the contract be usurious within the statute; Or, 2. though not usury within the statute, if it be an unconscionable bargain. You all remember where the court held a case not within the statute of usury. I mean the case of the wire-drawers*. The ground of the action there was, that the plaintiffs, who were gold refiners, had advanced gold wire to others in the same trade, upon the terms of paying such a price, if the money was paid *within three months;* and if *not, then* to pay at the rate of *an halfpenny an ounce per month, over and above* the price agreed for; which in fact, upon calculation, amounted to above 5 *per cent.* This, at the trial, was proved to be the *constant usage of the trade.* An objection was made on the part of the defendant that it was usurious. A verdict was found for the plaintiff, and a question reserved for the opinion of the

* Floyer v. Edwards, *supra*, 112.

court,

court, Whether this contract was usury? And under all the circumstances, especially the constant usage, the court were of opinion it did not amount to usury within the statute. Some time after, an action was brought for *money had and received*, upon a similar contract, "to recover the *surplus* of the half-penny an ounce*." The defendant paid into court the principal and interest at 5 *per cent.* from the time of the bargain, and offered to pay costs down to the action brought: And the single question was, "Whether the *excess* of interest should be paid?" It appeared manifestly at the trial, that this excess was only to be taken in case of delay of payment at the end of three months, and for no other reason whatsoever; and the vendee was at liberty to have paid the principal at the expiration of that time. I ruled at *Guildhall* that the transaction ought to be considered as not usury within the statute. But the law of the land having declared that 5 *per cent.* was sufficient for delay of payment, I was of opinion that the demand of the surplus was an *exorbitant demand*, and therefore ought not to be recovered in an *action for money had and received*. The jury accordingly found a verdict for the defendant, and that opinion was acquiesced in without any new trial being moved for.—But to consider this case first in the light of an usurious contract. There is no contrivance whatever by which a man can cover usury. Here are two brokers. One, who is the defendant, wants to buy goods that were upon sale; and the other agrees to lend him money for that purpose; but he is to lend it upon the terms of being paid both principal and interest from the time the loan commenced. It is true no rate of interest is reserved in the note: But it is made *payable on demand*: From the moment of demand therefore, it would carry interest; and the plaintiff had it in his power to make demand, the very instant the bill was delivered. Besides this, he does not even trust the defendant with the possession of the money in his own hands. But when the goods are bought, and not *before*, he pays the money to the landlord for the defendant. Within two hours after he demands the money, and then the note begins to carry interest. He was not bound by the agreement to give credit for a moment. So that there was no sort of risk whatsoever; and in fact, as soon as the money was paid, a man was put into possession for himself, as well as for the defendant. The note therefore, was payable with interest from the time of demanding payment, and he has possession of the goods:

* The name of it was *Plumb* v. *Carter*. See a short note of it *supra*, 116.

That

1778.

Jestons *versus* Brooke.

That was manifestly with a view to secure to himself the surplus advantage which he had stipulated for, upon a re-sale. Both parties from their situation knew there would necessarily be a profit. It seems to me therefore, that the intention of the contract was to get more than principal and legal interest upon the note, which is usury within the meaning of the statute. But suppose it were not strictly usurious, shall a man in an action for *money had and received*, which is an equitable action, and founded in conscience, recover such an unmeasurable and exorbitant demand as this is? Most clearly he shall not. Therefore, upon either ground, the verdict must be set aside, and the nonsuit entered.

Willes, Justice.—I am of the same opinion.

Ashhurst, Justice.—I think that upon the original contract, it must be understood the plaintiff was to have no interest, and therefore the contract itself was not usurious. But having broken the faith of that agreement, by making an immediate demand of payment, and thereby entitling himself to interest, I am of opinion he has precluded himself from demanding a share of the profits of the sale likewise; for it is against conscience that he should have both.

Buller, Justice—Whether this be usurious or not, it is clearly great oppression. Lending money is giving credit. And here the consideration was, that the plaintiff should have half the profits of the sale. But instead of giving credit, he demands the money immediately. The consideration therefore is at an end,

Per Cur. Let a nonsuit be entered.

Tuesday, *May* 19th.

Phipard *versus* Mansfield.

One by will devises all his lands to his *two* brothers *W. P.* and *J. P.* and his *sister* *E. C.* and the *heirs of their bodies*, as *tenants in common*, and for *want of such issue*, to his own *right heirs*.—And then gives all the rest and residue of his goods and chattels, as well *real* as *personal*, equally between his said brothers and sister, share and share alike. The devisees take *cross-remainders*.

THIS was a case out of *Chancery*, for the opinion of this court, stating in substance as follows; "That *George Phipard* being seised in fee of a fourth part of an estate in *Surrey*, made his will bearing date the 5th of *June*, 1738; and thereby disposed of the same as follows: "As for and touching the dis-"position of *all such temporal estates* as it has pleased G[illegible] to "bestow upon me, I give and dispose thereof as followeth. "First, I give, devise, and bequeath *all* those my lands, tene-"ments and hereditaments, situate and being at *Merton Abbey*

"in

1778.

PHIPARD *versus* MANSFIELD.

" in the county of *Surrey*, unto my loving brothers, *William* " *Phipard* and *John Phipard*, and sister *Elizabeth Cleaves*, and " the *heirs of their bodies lawfully begotten* and to be begotten, " as tenants in common, and not as joint tenants; and *for* " *want of such issue*, to my own right heirs for ever. All " the rest and residue of my goods and chattels whatever, as well " *real* as *personal*, I give and bequeath unto my said brothers and " sister, *equally to be divided* between them, share and share alike." *George Phipard* died soon after making his will, leaving his brothers and sister surviving, of whom *William* was his heir at law. *Elizabeth Cleaves* died, *March* 31st, 1769, leaving the defendant her only daughter, who married *Richard Mansfield*.—*John Phipard* died the 10th of *April* 1774, *without issue*, not having suffered a recovery of the part he took as tenant in tail under the will of *George Phipard*; but having made his will, and given all his real and personal estate, to the defendant and the plaintiff's children, *equally*: The question was, Whether the plaintiff was entitled to *any* and *what* share under the will of *George Phipard* deceased? That is, Whether there were *cross-remainders* created by the will, or whether *William* was entitled to the *whole*, as *heir at law*, under the reversion in fee?

Mr. *Wilson*, for the plaintiff, after stating the case, said, the rule of law was so fully settled against *presuming* cross-remainders in a will, where *more* than *two* take as tenants in common, that the single question for the consideration of the court was, Whether there were any circumstances apparent upon the face of the will, from whence it could be fairly collected, that the *intention* of the testator was to create cross-remainders in this case? And as to that, he said, he was unable to find out any circumstances in it, similar to those, in which cross-remainders had in other cases been implied. In *Dyer* 303. *b. pl.* 49. the testator devised *two* parts of his estate to his *four* younger sons in tail, and " if they *all die* without issue male, then " the said *two parts* to revert to the testator's own right heirs." In that case, the court held, that the word " all," " if they *all* " die without issue," shewed his intention was, that no part should revert, so long as there should be any issue male of the surviving devisee. So in *Holmes* versus *Meynell*, *Raym.* 452. where the devise was of " *all* the testator's lands to his two " daughters and *their heirs*, equally to be divided between them; " and if they die, then *all* the said lands were to go over;" the court said, " it was plain that by, '*all* the said lands,' the testator

1778. "tator meant the *whole* to go over at the *same* time, and not a "*moiety* at different times." But here the word "*all*" is not re-

PHIPARD *versus* MANSFIELD.

peated in the devise over; nor is it said "if *all* die without issue;" but the estate is given to the devisees, as *tenants in common*, and *not* as *joint-tenants*; which words, as *effectually disjoin the title*, as if the testator had used the word "*respectively*," which clearly would have prevented cross-remainders; and so it was expressly held, in *Cumber* v. *Hill*. 2 *Barnard*. 367, 443. 2 *Str*. 969. S. C. *Brown* versus *Williams*, 2. *Str*. 996. and by Lord *Hardwicke* in *Davenport* versus *Oldis*, 1 *Atkins* 579. In this last case, Lord *Hardwicke* also said, "there could be no case cited where cross-"remainders had been adjudged to arise merely upon the words "for want of such issue." So that those words are of no avail in this case (Lord *Mansfield*. When the word "*respectively*" is used, the words "want of issue" do not operate at all). In *Marriot* v. *Townley*, 1 *Vez*. 102. cross-remainders were created by the words "joint-tenants, and no stress laid upon the words "*for want of such issue*." If such words alone are to create cross-remainders, the old rule laid down in *Gilbert* v. *Witty*, 2 *Cro*. 655. and every other case, that they cannot be raised without express words between *more than two*, will be inverted; and they will be implied in all cases, where they are not expressly negatived.

Lord MANSFIELD.—My note of the case of *Davenport* v. *Oldis* is this: "The court held this not to be a cross-remainder, be-"cause the words '*several and respective*' effectually *disjoin* the "title; and that the presumption was as strong in favour of the "wife, as in favour of all the rest."

ASHHURST Justice.—Amongst the different cases of cross-remainders in the books, is there any, where one of the devisees was likewise the heir at law of the testator?

Serjeant *Grose contra*, for the defendant, said, he had no difficulty to admit the general rule contended for, that the legal presumption is against raising cross-remainders between *more than two*; if taken with the restriction annexed in the case of *Pery* v. *White* * (adjudged on *Friday* last) that such presumption may be *rebutted* by manifest circumstances apparent on the face of the will. For here, the clear intention of the testator was evidently *against* such presumption. He had two brothers and a sister, all equally near to him in point of relationship, and the devise is, "of all his lands," as in *Holmes* v. *Meynell*, to them and the *heirs of their bodies*, as tenants in common, and not

* *Supra*, 777.

as

as joint-tenants (not a *separate* devise to *each*, as in *Gilbert* v. *Witty*, 2 *Cro.* 655.); and "*for want of such issue*," *generally*, (*scil.* the issue named,) *not* "*the issue of their respective bodies*," as in *Cumber* v. *Hill*, *Brown* v. *Williams*, and *Davenport* versus *Oldis*, he gives the reversion to his own right heirs; not to his *brother*, who was *then* his heir at law. Nothing therefore can be so plain and evident, as that he looked forward to a distant period when *all* should be dead without issue, and that then such person as should be his right heir should take. He cited *Wright* v. *Holford*, *East.* 14 *Geo.* 3. *B. R.* * and *Doe ex dim. Burden* v. *Burville*, *East.* 13 *Geo.* 3. *B. R.* in which last mentioned case, cross-remainders were implied between *more* than two. And concluded with praying, that the court would certify in favour of the defendant.

* Supra, 31.

Lord MANSFIELD.—The reason given in the old cases against raising cross-remainders, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly has not now. To be sure, where they are to be raised between *two* and *no more*, the *favourable presumption* is in *support* of *cross-remainders*: Where between *more* than *two*, the presumption is *against* them; but the intention of the testator may defeat the presumption in either case.—In *Davenport* versus *Oldis*, where the question was, whether cross-remainders should be raised between two only, Lord *Hardwicke*, by way of general observation, lays it down, "that the words, 'in default of such issue,' "shall not merely in themselves create cross-remainders." But since that time, in the case of *Wright* v. *Holford* †, the court went expressly on the distinction of there being no words, such as "*respectively*," to sever the titles; but that the limitation over being "in default of *all* the issues," the rule of construction laid down as between *two*, should obtain. The case of *Wright* v. *Holford* therefore, upon *full consideration* says, that these words shall lay such a foundation as to create cross-remainders; and in general, I believe, in devises of this kind, the intention of the testator is in favour of cross-remainders. But there must be something, some circumstances manifesting such intention, to encounter the rule of law laid down in *Pery* v. *White*, on *Friday* last. In the present case see what the circumstances are. The testator had two brothers and a sister: If he meant his estate should have gone to his heir at law there was no occasion to make a will. Therefore it is clear he did not mean his brother *John* should take it as heir, or that *William* should do so; but he meant that his sister should be equally an object of his bounty.

† Supra, 31.

It

1778. It is as clear that he meant, no division should take place to create an inequality between them, till a failure of the heirs of *all* their bodies. He therefore begins with the disposition thus; "As to all my temporal estate, I give my lands to my two "brothers and my sister, and to the heirs of their bodies law-"fully begotten." These are the words of an ignorant man, and the will is inaccurately drawn; for there cannot be a limitation to two brothers and a sister, and to the heirs of their three bodies. The court therefore must mould them as near to the intent of the testator as they can. The lands, he says, are equally to be enjoyed by his brothers and his sister, and the heirs of their bodies. He goes on to dispose of the rest of his worldly estate with the same intention: For he gives all his goods and chattels, both real and personal, equally to his two brothers and his sister, share and share alike. It was impossible to have expressed his intention, that his sister should take equally with his brothers, more plainly. He meant his estate should continue fettered with an entail, as long as the existence of the persons then in being, and their issue: And that his heir at law should take nothing till after that entail was determined. Whereas, if the construction were to be, that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality which the testator never intended to make. For it is limited to them and the heirs of their bodies, and for "want of such issue." "Want "of issue," there plainly means, issue of all of them: How can it then be executed but by raising cross-remainders. It seems to me as strong a case as that of *Wright* v. *Holford*.

PRIPARD *versus* MANSFIELD.

WILLES Justice.—I believe there are few cases which come before the court, where cross-remainders are not meant by the testator. The reason given in the old cases for not allowing the implication of cross-remainders, between more than two, is to prevent the splitting of tenures. The doctrine of feuds had a very good foundation, but when feuds ceased, the occasion which gave rise to the rules which they established, introduced a great deal of nonsensical reasoning; and I wonder how it could have obtained in *Westminster-Hall*, in these cases; as cross remainders were allowed so long ago as the case in *Dyer* 303.—In later times the courts of law have said, that where the intention of the testator is plain, cross-remainders shall be implied. The question here is, "Whether there are sufficient words to create cross remain-

"ders?"

"ders?"—In the case which came before us on *Friday* last *, I examined the will very accurately, to see whether there were any words in it, which could shew that the intention of the testator was to create cross-remainders. But there were neither the words, "heirs of their bodies," nor "want of issue." In the present case, in the first place, the objects of the testator's bounty were all equally related to him, and it appears to be his intention that they should be equally benefited, both by his real and personal estate: for there are no words which shew a preference to any one in particular. It is argued, that the devise to the heir at law makes a preference; but our opinion is, that it is only superfluous. I do not rest much upon whether the word "*all*" which is relied on in some of the cases quoted, was annexed to the devise or the remainder. In *Davenport* v. *Oldis* there was the word, "respectively," therefore there was no occasion for Lord *Hardwicke* to have said any thing as to the words "for want "of such issue." That point was not properly before him. In *Wright* v. *Holford*, the court thought themselves bound by the words, "in default of such issue," and certified accordingly. These words are used here: the cases then are the same, with this difference only, that here, the cross-remainder is to be raised between *three*, instead of being raised between *two*. Wherever I can distinguish between the case of *two* and *three*, I will: but I see no ground in this case.

1778.

PHIPARE *versus* MANSFIELD.

ASHHURST Justice.—The leaning of courts of justice ought always to be in favour of cross-remainders, because that construction is most consonant and agreeable to the intention of testators in general. I think the present is a case in which there are circumstances, that stand clear of all the circumstances which have occurred in former cases, where the same question has been litigated. For the limitation here, is the same as if the testator had said in express words, "With regard to all persons "mentioned in my will, I consider them equally as objects of my "bounty: But looking afterwards to the event of their issue "failing, in that case, I give my estate to my right heirs." His intention therefore was, to continue the estate fettered with an entail, till they and their issue were extinct; and consequently a contrary construction would be subversive of that intention.

BULLER Justice.—This case is perfectly consistent with the resolution of the court on *Friday* last; for there no intention appeared. *That* being so, the general rule laid down must govern:

* *Pery* v. *White*, *supra*, 777.

This

1778. PHIPARD *versus* MANSFIELD.

This case stands equally clear of that rule. We have been pressed with the case of *Davenport* v. *Oldis*. The words there, were applied to what went before in the will; for it was a case of intention only, which Lord *Hardwicke* collected from the other words, and he refers, "want of issue," to the word "*respectively*." There is another case, *Marriot* v. *Townley*, 1 *Vez.* 102. where Lord *Hardwicke* says, the words "for want of such issue" must mean "*want of the issue of all*:" That therefore is an additional authority to the case of *Wright* v. *Holford*; and as there are no words to sever this estate, I am of opinion, there should be cross-remainders.

Afterwards, on *May* 21st, in this term, the court certified in the following words.—"Having heard counsel on both sides, "we are of opinion, that on the death of *John Phipard*, deceased, "*William Phipard* was entitled to *one moiety* of the share of the "estate which the said *John Phipard* took, under the will of "*George Phipard*, deceased, and no more."

GOODRIGHT *ex dim.* WALTER *versus* DAVIDS.

Same day.

If lessee covenant not to *under-let* without *consent* of the lessor, under *hand and seal*, with a power of re-entry, in case of a breach; *acceptance* by the lessor, of *rent* due *after* the *condition broken*, with *full notice*, is a *waver* of the forfeiture.

IN ejectment, the following case was reserved for the opinion of this court.—The plaintiff declared on a demise from *Philip Walter*, dated the 30th of *September* 1776, to hold from the 29th of *September*, then last, for ten years. At the trial of the cause, before Mr. Serjeant *Sayer*, at the last lent assizes, at *Maidstone*, for the county of *Kent*, it appeared, that the lessor of the plaintiff, by indenture of the 26th of *July* 1762, demised the premises to the defendant for forty-one years, if he the said *Walter*, the lessor, should so long continue rector of the parish of *Crayford*.—Among other things contained in the said indenture, there was a covenant that the defendant should *not under-let*, assign or transfer the premises, or any part thereof, *without* the *consent* of the said *lessor* in writing, *under* his *hand and seal* first had and obtained; with a power of *re-entry* to the said *Walter*, in case the defendant should not observe the covenants in the said lease.—It further appeared, by receipts produced and parol evidence that the defendants had under-let various parts of the premises in question, to several tenants for some years; but that the plaintiff's lessor knew of such under-lettings, all which were *previous* to *Michaelmas* 1775. The last receipt for rent paid by the defendant, was dated *March* 25th, 1777, "for "rent

"rent due to the plaintiff's lessor at *Michaelmas* preceding." The under-letting to Mrs. *Ware*, an under-tenant to the said defendant, was before *Michaelmas* 1775, and continued at the time of the ejectment brought. A verdict was found for the plaintiff, subject to the opinion of the court on the following questions: Whether a forfeiture was incurred by the under-letting? And if it were, Whether the same were waved by, or under the circumstances aforesaid?

Mr. *Morgan* for the lessor of the plaintiff argued, that the under-letting in the case stated, being an immediate forfeiture of the lease, the subsequent possession could only be, as tenant by sufferance. If so, the receipt of rent from the defendant, *after that* time, could not alone amount to a waver of the forfeiture, any more than a subsequent receipt of rent is of itself a waver of a notice given to quit *. But clearly, to make it a waver in this case, there ought to have been an acquittance *under hand and seal*; the terms of the covenant being expressly, "that the defendant should *not under-let* without "licence *under hand and seal*." Therefore he prayed judgment for the plaintiff.

Mr. *Thornton contra*, for the defendant, contended, that the lease, in this case, being *voidable* only, and *not void*, the acceptance of rent, *after notice* of the *condition broken*, was clearly a *waver* of the forfeiture. It is true, the lessor must have notice of the condition broken; and the day of payment must have past; but where these circumstances concur, it is immaterial whether the forfeiture is for non-payment of rent, or for any other breach. The great point is, whether the lease be *voidable* only, or absolutely *void*. In the *first* case, acceptance of rent will effectually *cure the forfeiture*; in the *latter*, it will *not*. And so are all the cases in the books. *Lit. Sect.* 341. and *Coke*'s Commentary upon it, 211. *b.* are in point. The latter says, "if the lessor "*accept rent due* at a day *after*, he shall not enter for the condition "broken, because he thereby affirmeth the *lease* to have *continu-* "*ance*." And again, *page* 215. *a.* "where the estate is *ipso facto* "*void* by the condition or limitation, *no acceptance* of rent *after* "can make it have a continuance—*Otherwise* it is, of an estate "or lease *voidable by entry*." The same point is also expressly laid down in *Pennant*'s case, 3 *Co.* 63. *b.* Upon these authorities therefore, he prayed judgment for the defendant.

* *Vide supra*, 243. Doe *ex dim.* Cheny *v.* Batten, *Hil.* 15 *Geo.* 3.

1778.

GOOD-RIGHT *versus* DAVIDS.

Lord MANSFIELD.—This case is extremely clear: To construe this acceptance of rent *due since the condition broken*, a *waver* of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it; but accepts rent subsequently accrued. That shews he meant the lease should continue. Cases of forfeiture are not favoured in law; and where the forfeiture is once waved, the court will not assist it. The consequence is, that there must be judgment for the plaintiff.

Thursday, May 21st.

STEVENSON *et al. versus* MORTIMER.

If *exorbitant* fees are taken by a custom-house officer from the *master* of a vessel, upon his taking out a *cocquet* and bond, pursuant to the stat. 13 & 14 *Car.* 2 *c.* 11. *sect.* 7; tho' the statute imposes the duty on the *master, personally*, the *owners* may recover the excess, in *assumpsit* for *money had and received.*

UPON shewing cause why the nonsuit directed in this case should not be set aside, and a new trial granted, the case appeared to be as follows: It was an *action for money had and received*, brought by the plaintiffs, as *owners* of a boat employed in carrying chalk and lime, from one part of the coast of *Sussex* to another, *viz.* from *East Bourne*, to *Hastings*: and the action was brought to recover the whole, or part, of certain sums of money paid by the *master* of the boat, who was the plaintiffs' *servant*, to the defendant, a custom-house-officer, as his fees, due upon the master's taking out a *cocquet* and *bond*; under an idea that this boat came within the provisions of the stat. 13 & 14 *Car* 2. *c.* 11. *sect.* 7. by which it is enacted, "that no goods "shall be shipped, or put on board, to be carried forth *to the* "*open sea* from any port or place, &c. to any other port or place "of the realm, without a sufferance or warrant first had and ob"tained; and that the master of every ship or vessel, who shall lade "or take in any goods, &c. in any port, member, or creek, within "the kingdom, to be landed or discharged in some other port, "member, or creek, shall, *before* the ship or vessel be removed or "carried out of the port where he shall take in such lading, *take* "*out a cocquet*, and become *bound* in a certificate with good "security, in the value of the goods, for delivery thereof, in the "*port* or *place* for which the same shall be entered; and to return "a certificate of their being so landed, upon pain of forfeiting the "penalty of the bond."—The question intended to have been tried was, Whether a *cocquet* was necessary to be taken out under the stat. 13 & 14 *Car.* 2. for goods carried *coastwise?* But, before the trial, the plaintiffs *gave notice*, that they also meant to go upon the

the ground of the defendant having taken *exorbitant fees*: He had demanded and received 14 *s*. and 6 *d*. 1778.

STEVENSON *et al.* *versus* MORTIMER.

Mr. Serjeant *Sayer*, before whom the cause was tried, was of opinion, that this duty being imposed by the statute upon the *master*, the action was *wrong brought*, in the *name* of the *owners*, and accordingly nonsuited the plaintiffs.

Mr. *Wallace*, Mr. *Rous*, and Mr. *Morgan*, who shewed cause, argued, that the nonsuit was right upon *two* grounds. 1. Because the uncertainty and surprise to which this species of action exposes a defendant, made it an improper action to try the right. To this purpose, they cited *Lindon* v. *Hooper*, *Hil.* 16 *Geo.* 3. *B. R.** where it was determined, "that a right of "common could not be tried in an action for money had and "received:" And said, this case was even stronger; because here, the payment was entirely *voluntary*, at the master's own request; and the officer bound to act. 2. The taking out a *cocquet*, &c. was a *personal duty* imposed by the statute *on the master*, under a severe penalty in case of neglect; therefore, he alone, if any one could be, was entitled to maintain this action. The words of the statute are, "that the *master* of every ship," *not*, "the *owners* of the vessel, shall &c." consequently, the latter have nothing to do with it. Here, the whole transaction was with the master only. He applied to the officer, requested the *cocquet*, &c. and paid the fees. Therefore, if wrong paid, he alone could be entitled to recover the money back.—They suggested further, that the ground of extortion was a *surprise* upon the defendant.

Lord *Mansfield*, without hearing the counsel on the other side, delivered his opinion as follows.—The ground of the nonsuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the *owners* of the vessel in question; but it ought to have been brought by the *master*, who actually paid the money. *That* ground, therefore, makes now the only question before us: As to which, there is not a particle of doubt. *Qui facit per alium, facit per se.* Where a man pays money by his *agent*, which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent. If money is paid to a known agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to his principal. *Sadler* v. *Evans*, 4 *Bur.*

* *Supra*, 414.

1778. STEVENSON *et al.* *versus* MORTIMER.

1984. Here the statute lays the burthen on the *master* from necessity; and makes him personally liable to penalties if he neglects to perform the requisitions of it. But still he is entitled to charge the necessary fees, *&c.* upon his doing so, to the *account* of his *owners*. And in this case, there can be no doubt of the relation in which the master stood to the plaintiffs; for he is the *witness*, and he swears, that the money was *paid* by the *order* of the *plaintiffs*. Therefore, they are very well warranted to maintain the action.—If the parties had gone to trial upon an apprehension that the only question to be tried was, Whether this was a case within the act of parliament, consequently, whether any fee was due; the plaintiff could not have been permitted to surprise the defendant at the trial, by starting another ground, upon which to recover a *Norfolk groat*. An action for money had and received is governed by the most liberal equity. Neither party is allowed to entrap the other in *form*. But here, the plaintiff gave *notice*, that he meant to insist that too much was taken; and therefore, both came to the trial with equal knowledge of the matter in dispute. Therefore, the rule for a new trial must be absolute.—Lord *Mansfield* added, that he thought, the plaintiffs ought to let the defendant know the amount of the excess which they claimed; that the defendant might have an opportunity of paying money into court; and the rule was drawn up accordingly.

Same day.

FURNEAUX *versus* HUTCHINS.

In a question upon the *custom* of tithing in the parish of *A.*; *evidence* that such a custom exists in the *adjacent parishes*, is *not admissible*.—*Secus*, if the custom be *laid* as the *general* custom of the *whole county*.

UPON shewing cause why a new trial should not be granted, the case, by the report, appeared to be as follows: This was an action for not carrying away tithes of barley. Plea, that they were not duly set out. Replication, setting forth a custom, "that when twenty scoves of barely were fit to "carry, the farmer always took eighteen, which made, a horse-"load, and left *two* for the parson." Rejoinder, that there was no such custom, and issue thereon. The cause was tried before Mr. Baron *Hotham*, at the last assizes at *Exeter*, for the county of *Devon*, when the question made, was, Whether the rector was bound to take his tithe as soon as any part was set out; or, Whether the farmer was bound to set out the tithe of the *whole field*, before any part was taken away? The evidence on the part of the plaintiff was, that a former incumbent, about fifty years

years before, had *two* years together carried the tithes away, as soon as any part was set out; after which time, a composition had been agreed upon, and had continued to the present time. That the field in question was *hilly*, and the barley ripened faster in one part of the field than in another; and if not cut partially, great part would be spoiled. Evidence was also given, that this was the custom in the *adjacent parishes*.

The counsel for the defendant called no witnesses; but rested his case; 1. Upon the weakness of the evidence given on the part of the plaintiff, in support of the custom: and 2. Upon the unreasonableness of it, supposing it to be a custom. The jury found a verdict for the plaintiff, against the inclination of the judge.

Mr. *Mansfield* and Mr. *Morris* shewed cause; and Serjeant *Davy* argued in support of the rule.

Lord MANSFIELD.—Proof of the custom in other parishes, is no evidence to affect the parish in question, unless the custom had been laid as a general custom of the whole county. Then, as to its being the custom of this parish, there is not the smallest proof of it. I think it a wrong verdict, against the opinion of the judge, and the justice of the case. Therefore, let there be a new trial, without costs.

N. B. Upon a new trial the jury found the same verdict. After which, the court refused to grant a third.

Friday, May 22d.

ATKYNS *versus* ATKYNS.

One seised for *life*, with remainder *in tail* to his *first* and other sons, of a considerable estate in the county of *Norfolk*;—being also seised in fee of the *manor* of *C.* and a *small estate* at *P.* in the county of *Gloucester*, and entitled to the *reversion* in fee of *another estate* in *that county*, after several estates tail in different persons, one of whom had a son aged eighteen years; devises "*all* that his *manor* of C. &c. and also *all* that his capital messuage, and *all* and every his lands, tenements, and hereditaments whatsoever, *situate* and *being*, *in* or near *P.* or *elsewhere* in the said *county of Gloucester*, to his executors, *upon trust* to *sell*, and to *divide* the money arising from the same *equally* among his *younger* children," of which he had *three*. Held, this *remote reversion* passed to the trustees.

THIS was a case out of *Chancery* for the opinion of this court, stating in substance, as follows: That *Edward Atkyns*, father of the plaintiffs and defendant, being seised for life, with remainder to his first and other sons, in tail male, of a real estate, at *Ketteringham*, in the county of *Norfolk*, of the annual value of 2000 *l.*: And being also seised in fee of the *manor of Coates*, in the *county of Gloucester*, and to an estate there, called *Pinbury* Park, of the annual value of 143 *l.* 3 *s.* subject to a clear annuity of 120 *l.* during the life of Mrs. *Fonnereau*; and being likewise seised and entitled to the *reversion in fee*, under the will of Sir *Robert Atkyns* the elder, *of* and in the *manor of Lower Swell*, in the said *county of Gloucester*, and to divers mes-

 suages

1778. fuages, lands, tenements, and hereditaments, there and in *Upper Swell*, and alfo *Stow-on-the-Wold*, in the fame county, fubject to feveral eftates tail in three different perfons, one of whom had a fon about eighteen years of age: and the faid *Edward Atkyns* the father, having a wife and four children, *viz.* the defendant, not fix years of age, his eldeft fon, and tenant in tail of the faid eftate in *Norfolk*, and the plaintiffs, *John* and *Mary Atkyns*, and alfo another fon, fince deceafed; by his will, bearing date the 19th of *April* 1763, devifed as follows: "I give, "devife, and bequeath, all that the manor or lordfhip of *Coates*, "in the county of *Gloucefter*, with the rights, royalties, and "appurtenances, and alfo all and every the meffuages, farms, "lands, tenements, advowfons, and hereditaments whatfoever, "of me the faid *Edward Atkyns*, fituate, lying and being with-"in, or adjoining to the faid manor or lordfhip; and alfo all "that my capital meffuage or tenement, and all and every my "lands, tenements, and hereditaments whatfoever, whether free-"hold or leafehold, fituate and being at, in, or near *Pinbury* "Park, or *elfewhere in the faid county of Gloucefter*, with their ap-"purtenances; and all my eftate, term of years, and intereft "therein, unto and to the ufe of my executors, their heirs, ex-"ecutors, and adminiftrators refpectively; *upon truft* to *fell* the "fame, and place out the purchafe monies on government or "real fecurities, at intereft, and to ftand poffeffed of the princi-"pal monies, in truft for *all* and *every of his children*, whether "male or female, (other than and except his eldeft fon only,) "*to be equally divided between them*, if more than one, fhare and "fhare alike, to be paid when he or they fhall feverally attain "their refpective ages of twenty-one years." The queftion was, "Whether the *reverfion in fee* of and in the manner of "*Lower Swell*, and other the premifes there and in *Upper Swell*, "and *Stow-upon-the-Wold*, did pafs by the will of the teftator, "*Edward Atkyns*, the plaintiff's late father, to, and thereby be-"came vefted in, *Dorothy Atkyns*, *John Wright* junior, and *John* "*Liotard*, the defendants, in truft for the faid teftator's young-"er children?"

ATKYNS *verfus* ATKYNS.

Mr. *Davenport*, for the plaintiffs, ftated the queftion to be, Whether the reverfion in queftion paffed by the general words "*elfewhere in the county of Gloucefter?*" And he argued, that it did pafs. It was clear the teftator had a power to difpofe of it. The only queftion therefore was, Whether it could neceffarily be inferred from any thing apparent on the face of the will, that the teftator did not mean this reverfion fhould pafs?

The contrary clearly appeared. 1. From the situation and circumstances of the testator and his family. For the defendant, his eldest son, if he survived his father, necessarily would come to the *Norfolk estate*, worth 2000 *l. per annum*: Seeing that he was so amply provided for, it was most natural the testator should give all he could dispose of amongst his younger children, of whom he had three. And if this reversion did not pass to them, nothing passed as a present provision, except about 13 *l. per ann.* It would be absurd, therefore, to suppose the testator meant to give them no more. 2dly, He contended, that the words used were clearly sufficient, in point of law, to pass the reversion in question. To this purpose he cited *Hawes* v. *Coney*. *Cro. El.* 159. *Dalby* v. *Champernon*, *Skin.* 631. *Rook* v. *Rook*, 2 *Vern.* 461. *Chester* v. *Chester*, 3 *P. Wms.* 56. and *Freeman* v. *Duke of Chandos*, *Mich.* 16 *Geo.* 3. *B. R. supra*, 363. He added, that in the case of *Strong* v. *Teat*, 2 *Bur.* 912. a general sweeping clause, giving "*all other* the lands, tenements, and hereditaments," in *two* counties before-named in the will, were held "not to pass a "*reversion in fee*, which the testator was entitled to, in one of "them, under his marriage settlement:" and possibly that case would be cited against him. But there, from the whole tenor and complexion of the will, it clearly appeared to be the *intention* of the testator that the reversion should *not* pass. Here, it as clearly appears to have been the intention, that the reversion in question *should* pass; therefore, the plaintiffs are entitled.

Mr. *Howorth*, *contra*, for the defendant, contended, that the court would require the clearest intention possible on the face of the will; otherwise the words, however comprehensive, could not afford a ground for disinheriting the heir. *That* is the rule of law. As to the intention then, it is manifest from the terms of the devise, that the testator meant to give his younger children that which was *saleable* only, and which could be turned into money: But a reversion after an estate tail in three different persons, one of whom had a son then eighteen years of age, was so remote a contingency, it could be worth nothing. Besides, the very attempt to sell would have defeated the sale; by prompting the tenants in tail to suffer recoveries. It is improbable, therefore, for the testator to have had this reversion in contemplation at the time; and if he had, it is too absurd to suppose he would have given such a direction to his trustees, as must effectually defeat his intention. If it was not his intention, the words, though ever so clear, will not pass it; and to this purpose, he cited *Strong* v. *Teat*, 2 *Bur.* 912.

1778. ATKYNS *versus* ATKYNS

Lord MANSFIELD.—The question is, Whether the word "*elsewhere*," shall be construed to have any meaning, or none at all? The testator had two sons and a daughter. The eldest son was provided for by the settlement, to the amount of 2000 *l. per annum*, independently of his father, who had very little to give his younger children; hardly enough to keep them from starving. The intention of his will was, to give them all he had in the world. He first gives them all his personal estate. His real estate was of two sorts; the manor of *Coates* and *Pinbury*, and the reversion in question, after three estates tail, one of the tenants in tail having a son then eighteen years of age. Both these estates together amounted but to a trifle. Suppose the testator did not know of this reversion; or if he did know of it, he might not know it was worth any thing. But this he might think of: That whatever he had in the world he would give to his younger children. He is studious to use words to pass every thing; and if this is not included, there is nothing for the words to operate upon: For except the estates of *Coates* and *Pinbury*, he had nothing but this reversion in the county of *Gloucester*. It is contended, that the word "elsewhere" means nothing. Now, confining it to the county of *Gloucester*, shews he had some imperfect idea at least of this reversion, or he would have said "elsewhere in the kingdom of *England*," or used some such general expression. It is not possible, if he knew of this reversion, that he should not charge it for the benefit of his younger children, when it came into possession. The doctrine in *Strong* v. *Teat* is not to be denied: But the intention is to be collected from the whole of the will taken together; and from thence the court is to determine, Whether the words mean a *local* description, or a *general* description of every thing? If the testator had had any other lands in the county of *Gloucester*, there might have been some doubt. But that is not the case.

Willes and *Ashhurst* Justices, were of the same opinion.

Buller Justice.—This decision is perfectly consistent with the determination in *Strong* v. *Teat*; and the case of *Freeman* v. The Duke of *Chandos* *, is in point: For there it is said, though so remote a reversion might not be particularly thought of, yet as the general words were sufficient to include *all*, and the intention of the parties was to include all, it should pass.

* *Supra*, 363.

Afterwards, on *Tuesday*, *May* 26th, in this Term, the court certified in these words, "We are of opinion that the reversion "in fee of the manor of *Lower Swell*, and other the premises

 "there

" there and in *Upper Swell*, and *Stow-on-the-Wold*, did pass by " the express words of the will of the testator, *Edward Atkyns*, " the plaintiffs' late father, to the trustees in the will named, " in trust for the said testator's younger children." 1778. ATKYNS *versus* ATKYNS.

On *Tuesday*, the 28th *July* 1778, the cause came on to be heard before the *Lord Chancellor*, on the certificate of the Judges of the *King's Bench*, when his Lordship was pleased to order, that their certificate should be confirmed.

The defendant appealed to the *House of Lords*; when the question sent for the opinion of the court of *King's Bench*, was put to all the Judges; and the Lord Chief Baron of the Court of *Exchequer* delivered their unanimous opinion upon it, in the *affirmative*. Whereupon it was ordered and adjudged, that the appeal should be dismissed, and the decree complained of affirmed.

SUTTON *versus* SUTTON.

THIS was a case out of *Chancery* for the opinion of this court; stating in substance as follows: That *Robert Sutton*, being seised in fee of a house in *Bath*, and of divers other freehold estates of the yearly value of 300 *l.* and of other freehold estates of the yearly value of 500 *l.* in remainder, after the death of his father, on the 27th of *February* 1771, made his will duly attested; and thereby gave unto *John Bright* and *George Dunstan*, all his lands in possession, reversion, or remainder, *except the house at* Bath, *upon trust* to *sell*, and dispose of the said lands, and to place the monies arising therefrom upon government or real security; and by, and out of the interest, dividends, and produce arising therefrom, to pay to his wife, *four hundred pounds* a year, in lieu of so much a year, which she would be entitled to by their marriage settlement. And he gave to his wife, *in satisfaction of the remaining* 50 *l.* which she could claim by the settlement, *his house in Bath* for her *life*, and, after her death, to his eldest son. After reciting his wife's being *enseint*, he gave to such child, whether son or daughter, 3000 *l.* to be paid out of the monies arising by the sale of the lands, and to be paid at his or her age of twenty-one. He did further by his will direct, that when the estates by him directed to be sold, were actually sold, and the monies arising from them invested in the said securities, that 100 *l.* a year should be given to his wife, for the bringing up of his daughter *Elizabeth Mary*, and *any after born*

1778. SUTTON *versus* SUTTON. *born child*; and if his said daughter, *or such after-born child*, should happen to die before his or her legacy should become due, that then such legacy should sink into the *residuum*, for the benefit of his son.—After some pecuniary legacies, he gave the rest, residue, and remainder of his estates, or monies not before disposed of, to his son; but *in case he should die before twenty-one, without issue*, he then gave and bequeathed the same residuary estate *to the child with which his wife was enseint, if a son, as his own for ever: But in case such child should prove a daughter*, then he gave the same residuary estate between his *two* daughters as tenants in common. At the time of making his will, the testator had *a son*, and *a daughter*; and his wife was *enseint* with another child (a daughter), afterwards named *Julia Margaretta*. After the date of the will, the testator *sold his house in Bath*, and had *two* daughters born; *Julia Margaretta*, and *Augusta Ann Sutton*. After the sale of the house in *Bath*, and the birth of his two daughters, the testator, in his own hand, made the *following alterations* in his will; but the making thereof was *not attested*, nor was the will *republished*.—In the devise to *John Bright* and *George Dunstan*, the *exception of the house in Bath* was *struck out*. In declaring the trusts of that devise, so far as related to his wife's annuity, he *interlined* the word "*fifty*," so that the annuity was altered to 450 *l*. *The bequest to his wife of the house in* Bath, *was* STRUCK OUT, *and the remainder to his son*. The *recital of his wife's being enseint, and the legacy of* 3000 *l. were* STRUCK OUT; and instead thereof, he inserted these words; "*I give to* "*my two daughters* Julia Margaretta *and* Augusta Ann Sutton, "2000 *l. each*." In the direction for bringing up his daughters, he made the word "daughter," *daughters*; and instead of the words "*after born child*," he inserted the words, "*Julia Mar-*" "*garetta* and *Augusta Ann Sutton*." In the clause respecting the lapse of the legacies, the word "*daughter*" was made *plural*, the words "*after born child*" were STRUCK OUT, and, instead of "*his or her*," the word "*their*" was inserted. He also made alterations as to his pecuniary legacies.—The *residuary devise* to the *child of which the wife was enseint*, was likewise STRUCK OUT, and instead of the word "*two*," before "*daughters*," he substituted the word "THREE."—The question referred to the opinion of the court was, Whether, by the will of the testator, as *altered*, *obliterated*, and *interlined* by him, any, and what part, of the real estate therein mentioned, passed thereby to any person, and to whom?

I was

I was not present at the argument of this caſe: But I have been favoured with a ſight of ſeveral notes of it, from which it appears, that the queſtion made on the part of the plaintiff was, Whether the alterations and obliterations in the will did not amount to a *total revocation of it*, with reſpect to the *real eſtate?* The bequeſts moſt materially to be affected by ſuch a conſtruction, were the *legacies* of 2000 *l.* to *each of the daughters:* As to them, the court declined giving any opinion, whether they were void, or not; recommending the deciſion of that point to be deferred, till ſuch time as the plaintiff, the teſtator's only ſon, an infant, ſhould come of age.—But as to the deviſe to the truſtees to ſell, they were clearly of opinion, it was *not revoked*; and agreeably to that opinion, certified to the court of *Chancery* in the following words*: "We are of opinion, that the deviſe of the real "eſtates to the truſtees, to be ſold and converted into money, is "not revoked, but continues in full force."

1778.

SUTTON *verſus* SUTTON.

May 26th.

WILLET *verſus* CHAMBERS.

Saturday, May 23d.

If two are partners, as attornies and conveyancers, and one receive money to be laid out on mortgage, the other is liable for the amount, tho' his partner gave a ſeparate receipt for it.

THIS was an action for money had and received to the plaintiff's uſe, brought againſt the defendant, as *ſurviving partner* of one *Dadley*. Plea, *non aſſumpſit*. Verdict for the plaintiff, damages 480 *l.*

Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the facts appeared to be as follow: That *prior* to any partnerſhip between the defendant and *Dadley*, who was an *attorney* and *conveyancer* at *Coventry*, the *latter*, in the year 1771, received of a Mr. *Bindley*, the ſum of 350 *l.* to be laid out on a real ſecurity: *Dadley* accordingly furniſhed him with a mortgage from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had *forged*. At *Midſummer* 1776, *Dadley* and *Chambers* entered into partnerſhip: Shortly after which, *Bindley* wanted to call in his money. The pretended mortgagor was ſuppoſed at the ſame time to want a further ſum of 150 *l.* which, added to the original mortgage money, made together the ſum of 500 *l.* The plaintiff *Willet* was ready to advance this ſum: And, in conſideration of his doing ſo, an aſſignment was made to him of the pretended mortgage, before made to *Bindley*. As to 180 *l. part* of this ſum of 500 *l. Willet* paid it into *Dadley*'s office, to *Chambers*, who gave the following receipt for it: "Received of Mr. *Benjamin*

"*Willett*

1778. "*Willett*, the sum of 180*l.* for which *I* promise *to account to him* "*on demand.*—*Chambers.*"—*Dadley* was not at home, when this sum was paid.—Some time after, the plaintiff called at the office to pay 300*l.* more, part of the remaining 320*l.* due. *Dadley* being then at home, *Willet* paid the money to *him*; and in return, *Dadley* gave him the following receipt: "Received on account, of "Mr. *Benjamin Willett*, 300*l.*; the remainder of the money to "be paid, being 20*l.*—*Dadley.*" It was admitted, that the defendant *Chambers* was in no respect privy to the forgery; and that *no procuration money* was paid, either to *Chambers* or *Dadley*.

WILLETT *versus* CHAMBERS.

Serjeant *Hill* and Mr. *Green*, who shewed cause, argued, that this was not distinguishable from the common case of a surviving partner, who is always liable to partnership debts.

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheler*, *contra*, in support of the rule, contended, that this transaction was not within the compass of the partnership, which was for the purpose of carrying on the business of *attornies only*; *not* that of *scriveners*. A money scrivener is a person who receives money for the purpose of deriving some advantage from the receipt of it. But a mere conveyancer, as such, is by no means a money scrivener. His business is only to draw deeds and writings for the transfer of property from one man to another; and his profit arises from his bill of fees and charges for so doing. The two branches therefore, though it may happen that they are sometimes exercised by the same person, are in themselves totally distinct and separate. If so the fact of their being united in the partnership carried on between the defendant and *Dadley*, ought to have been *proved*; whereas, the reverse is the truth of the case. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that *Chambers* received, was punctually *paid over* to *Bindley*: That alone therefore would be an answer to the present demand. The receipts they gave, were separate; *not* "for *partner and self*;" but "*for* "*which I promise to account.*" In short, the whole of the transaction was entirely foreign to the partnership, and what each did, plainly shewed he considered the part he took in it, as his own separate act and deed only. Therefore, they prayed the rule might be made absolute.

Lord MANSFIELD.—Both parties in this case undoubtedly are innocent; and the loss that will fall upon the defendant, if the law

law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the court would be in his favour. But the queſtion is, "Whether, in *point of* "*law*, this engagement with *Dadley* does not make *Chambers* "anſwerable?" 1778.

To go by ſteps.—It is neceſſary to ſee what the buſineſs was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admiſſion of the counſel on both ſides, it was the buſineſs of an *attorney* and *conveyancer*. By proof in the cauſe, it appears to have been a *great deal more*. For he had *many appointments*, though the nature of them is not particularly mentioned. He had alſo *agencies*, and was *clerk to a navigation*. But there is no pretence that he ever received *procuration money*. The buſineſs of conveyancing, in the very nature of it, as carried on in the country, is this: Where there is an attorney or counſel of credit, they receive money to place out upon ſecurities; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe. Their *profit* ariſes from *having the money* in their hands, before it is laid out upon the intended ſecurities; and from *their fees and bill of charges* upon the conveyances they draw. It is not diputed but that this was the nature of *Dadley*'s conveyancing buſineſs: He did not act however as a ſcrivener, who ſometimes does not touch the money; but who in all caſes gets *procuration money*. There is no proof of any tranſaction of that kind; nor indeed is it cuſtomary for attornies like him to do ſo; for they get profit enough without it. I remember a caſe before me of a perſon who was truſted to the amount of many thouſand pounds, in the manner I have ſtated; and *that* is the nature of the buſineſs.

This was the buſineſs of *Dadley*, *before the partnerſhip*. Let us ſee then, what was the nature of the partnerſhip, afterwards entered into between *Dadley* and the preſent defendant; whether it was *a general partnerſhip* in *all Dadley*'s buſineſs, or *confined* to *one particular branch* of it only; for to be ſure, there *may be* ſuch a *confined partnerſhip*. The evidence as to this point conſiſts in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears, there was no particular reſtriction; it was not to be confined to ſuits, nor conveyancing only, but they were to be *partners in the buſineſs* which Mr. *Dadley* carried

on.

1778. on. Each was to be worth a certain fum.—The profits are ftated at 800 *l.*—Then it is agreed that a provifion fhall be made for the family of whichever of them fhould happen to die firft. And then comes the following *claufe* at the end, which, though not taken notice of by the counfel on either fide, is very material indeed upon this occafion. My object in examining it particularly, was to fee whether it contained any reftriction. The claufe is this: "*Note*, this fcheme of partnerfhip is intended to include *all* Mr. *Dadley*'s prefent and future practice and appointments, fuch as *agencies*, *navigation-clerk*, &c.: But *not* to extend to any *public* office or place, which may at any future time be given to either of the parties." The only reftriction therefore is that; or more properly fpeaking, it is the only exception to this general partnerfhip.

WILLETT *verfus* CHAMBERS.

Thus the partnerfhip commences, without waiting for articles; and from that time, the *bufinefs* was carried on in partnerfhip. One branch of that bufinefs was *conveyancing*. Incident to *conveyancing* is the *receiving of money* to place out upon fecurities. Receiving it *from the lender* to advance to the *borrower*, and acting for both parties refpectively. From that the profit arifes; not from *procuration money*, but from the money lying in their hands before it is placed out; and when placed out, from the charges and fees for drawing and engroffing the conveyances.

The facts then are fhortly thefe:—The plaintiff *Willett*, wanting to place out a fum of 500 *l.* applies to the office without making any diftinction between the two partners. The firft fum he advances is 180 *l.* This he pays to *Chambers* who gives a general receipt for it, not expreffing it to be for *Dadley*, or for what or whofe ufe; but making himfelf accountable for the amount on demand. He receives it therefore as the *principal*, *not* as the *agent* of *Dadley*: And it is admitted he knew the ufe, by placing it out upon the fecurity for which it was put into his hands. The next fum, which was 300 *l.* is paid by the plaintiff to *Dadley*, who receives it exactly in the fame manner as *Chambers* did the former fum, as *principal*, and gives a receipt for it, not as for fo much money to be placed out, but as the fum for which he was to be accountable. The two fums together come within 20 *l.* of what was wanted upon the fecurity.—Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious perfon, and had wanted a further fum of money upon the affignment, *he* fhould have paid the expence of conveyancing. But the bill is brought

in

in, to the plaintiff, and made out "debtor to *Chambers* and "*Dadley*." *Chambers* receives the money, and gives a receipt for it. In that transaction therefore, he is clearly considered *as a partner*, and the transaction itself as a *partnership transaction*. If *Dadley* had received procuration money, and that kind of dealing had been excepted out of the articles; or, if separate accounts had been kept of the money got by these transactions, and it had all been set down to the profits of *Dadley* only, it might have varied the case: And Mr. Justice *Ashhurst*, who tried the cause, would have been very glad to have given a direction in favour of the defendant. He suffers by the rascality of a man who had a very good character. I am very sorry for the defendant; but upon this evidence I cannot say, but that it is a *partnership transaction*.

1778.

WILLETT *versus* CHAMBERS.

Mr. *Newnham* informed the court, that the bill included other business as well as the particular transaction of the mortgage.

Lord MANSFIELD said, *that* proves nothing, but that in general they were partners in the fees of conveyancing.

Per Cur. Rule for a new trial discharged.

POWER *versus* WELLS.

Same day.

Idem *versus* Eundem.

If money and a horse are given in exchange for another horse *warranted sound*, which was *unsound* at the time, an action for *money had and received* is *not* a *proper* action to try the *warranty*.—Nor will *trover* lie for the *horse* given in *exchange*; because the *property* is *altered*.

UPON shewing cause against a new trial, in the above causes, Mr. Justice *Ashhurst*, before whom they were tried, reported as follows:

The *first* was an action for *money had and received*, brought to recover a sum of twenty-one pounds paid by the plaintiff upon the exchange of a mare of his, for a horse of the defendant; which the defendant *warranted* to be sound; but which was clearly proved to be unsound at the time. Immediately upon discovering that the horse was unsound, the plaintiff sent it back, together with a letter by a person who put the letter and halter into the defendant's hands in the defendant's yard, but he refused to take them. The person at the same time demanded the twenty guineas and the plaintiff's mare given in exchange; but the defendant said he had sold her, that he would have nothing to do with the person sent by the plaintiff, and turned him out of his yard. Upon which the plaintiff brought both the above actions.

The

1778. The *second* was an action of *trover* for the mare. Both causes stood for trial in the paper together. As to the first, an objection was made at the trial to the form of the action, and I was very doubtful how far it was maintainable. But it was agreed that I should sum it up to the jury, and if they should be of opinion with the plaintiff upon the facts proved, then, instead of making a special case, it should be put in the form of a motion for a new trial. The jury found for the plaintiff. As to the second action, it was agreed that a verdict should be taken for the plaintiff upon the evidence given in the first cause, but with liberty to move for a new trial; and it was understood between the parties, that the defendant should be entitled to the same redress in both causes, in case the opinion of the court should be in his favour, as if the whole had been stated in the form of a case.

POWER *versus* WELLS.

Upon shewing cause, the question was, Whether the above actions were rightly conceived? or, Whether the plaintiff should not have brought a special action on the case? Mr. *Wheler* for the plaintiff. Mr. *Newnham* for the defendant.

The *court* were of opinion that *both* actions were *misconceived*. 1st, The action for *money had and received*, with *no other count*, was an *improper* action to try the *warranty**. 2d, The action of *trover* could not be maintained, because the property was *transferred* by the *exchange*.—Accordingly a nonsuit was ordered to be entered up in both causes.

* Vide *Stuart* v. *Wilkins*, *Dougl. Rep.* 18. and *note* the *difference* between a count for money had and received *only*, and an action of *assumpsit* to try the *warranty*.

Tuesday, May 26th.

COOKE *versus* BOOTH.

A. demised to *B.* for the lives of the said *B.* and of *C.* and *D.*, and *covenanted*, that if the said *B.*, his heirs, &c. shou'd be minded at the decease of the said *B. C.* and *D.*, or any of them, to surrender the said demise, and take a *new lease*, and thereby add *a new life* to the then *two* in being, in lieu of the *life* so dying, that then he the said *A.* his *heirs*, &c. upon payment for *every life* so to be added, in lieu of the life of *every of them* so dying, would grant a *new* lease for the lives of the *two* persons named in the former lease, and of such *other person* as the said *B.*, his heirs, &c. should appoint in lieu of the *person* named in the preceding lease, as the same should *respectively* die, *under the same rent and covenants*.—There had been *successive renewals* from the time of a former lease granted by the ancestor of *A.*; and in *each*, a like covenant for renewal. Held that *A.* and his ancestors had, by their *own acts*, construed this to be a covenant for a *perpetual renewal*.

THIS was a case out of *Chancery* for the opinion of this court, stating in substance as follows: That *Robert Booth*, by indenture, demised certain premises to one *Otho Cooke*, for the

lives

lives of the said *Otho Cooke*, *Elizabeth Cooke*, and *Robert Cooke*; and the said *Robert Booth* thereby covenanted as follows; "that "if the said *Otho Cooke*, his heirs and assigns, shall be minded, *at* "*the decease of the said* O. C., E. C. *and* R. C. *or any of them*, to "surrender this present indenture, and take a new lease of the "said premises, and thereby add *one new life* to the then *two* in "being, *in lieu of the life so dying*; that *then* the said *R. B.* his heirs, "*&c.* upon request, on such surrender of the lease then in being, "and upon payment of one broad piece of gold of twenty-two "shillings value, or twenty-two shillings in silver, to the said "*R. B.* his heirs, *&c. for every life* so to be added in lieu of "the life of *every of them* so dying, and at the proper costs of "the said *Otho*, without demanding any further fine for the "same, shall and will grant and *execute* unto the said *Otho Cooke*, "his heirs, *&c.* a *new* lease, for the *lives* of the *two* persons "named in the *former* lease as shall be then living, and of such "*other person*, as the said *Otho Cooke*, his heirs or assigns, shall "nominate and appoint, in lieu of the person named in the pre-"ceding lease, as the same shall respectively happen to die, un-"der the beforementioned annual rent, and the *same covenants* "*therein contained.*"—This lease bore date the 22d of *December* 1749, and there had been *successive renewals* containing the same *clause of renewal*, from the time of a former lease, granted by the ancestor of the said *Robert Booth*, bearing date the 3d of *August* 1688, down to the date of the lease in question: *viz.* A renewal by the said *Robert Booth* in the year 1725; another on the 9th of *November* 1746; another on the 1st of *February* 1748, which was granted to the said *Otho* upon the same lives as the lease in question; and then the present lease was granted.—In *January* 1773, the said *Otho Cooke* died; whereupon the plaintiff, his widow, and *Robert Cooke*, his eldest son, (since deceased,) became entitled, as devisees under the will of the said *Otho*, to the leasehold premises for their joint lives. Shortly after, a new lease, in precisely the same terms as the lease of the 22d of *December* 1749, was tendered to the defendant to execute for the lives of the said *Elizabeth* and *Robert Cooke*, and *also* for the life of *James Cooke*: But the defendant refused to execute it. Soon after, *Robert Cooke*, another life named in the said lease of 1749, died; whereupon, another indenture in the like words, except that the name of *Mary Cooke* was inserted instead of *Robert Cooke*, was tendered to the defendant, who refused to execute it, because it contained a covenant for renewal on

1778. on the death of *James* and *Mary Cooke*, who were not any of the lives named in the original leafe of 1749: But he was willing to renew, on the death of *Elizabeth Cooke*, for the lives of the faid *James* and *Mary*, and for fuch other perfon as the reprefentatives of *Otho* fhould nominate, in lieu of the faid *Elizabeth*, and for the life of the longeft liver of them the faid *James* and *Mary*, and fuch other perfon fo nominated, on payment of twenty-two fhillings, and fubject to the rents and covenants in the original leafe; but not to renew any farther. The queftion was, Whether the leafe fo tendered, or offered to be executed by the defendant *John Gore Booth*, be an execution of the covenant in the faid leafe, dated the 22d of *December* 1749?

COOKE *verfus* BOOTH.

Mr. *Wilfon* for the plaintiff ftated the queftion to be, Whether the defendant, as devifee of *Robert Booth* the leffor, was bound to add any covenant for renewal after the death of *Mary Cooke?* or in other words, Whether this were a covenant for a *perpetual renewal?* And he contended it was. In *Ireland* fuch covenants are frequent: And the cafe of *Bridges* verfus *Hitchcock*, *Dom. Proc.* 15th *June* 1715, and *Furnival* v. *Crewe*, 3 *Atk.* 83. fhew that fuch a covenant is not illegal in *England*. The queftion then is, Whether the leffor has or has not made fuch a covenant? As to that, he certainly has covenanted, that the fame covenants as were in the old leafe fhould be inferted in the new leafe. It cannot therefore be prefumed, that the covenant for renewal was not in the contemplation of the parties: And if it was, it is clear they muft have intended it to be *general*, or it would have been reftrained. But it is clear from the terms of the covenant, that it was intended to be general: For it is not confined to the lives named in the original leafe of 1749; but the words are, "that he will grant a new leafe for the lives "of the *two* perfons named in the former leafe, and *of fuch other* "*perfon* as fhall be nominated in lieu of the life named in the "preceding leafe, as the fame fhall *refpectively die*, under the "*fame covenants*. He cited the cafes of *Bridges* verfus *Hitchcock* * "and *Furnival* verfus *Crewe*, beforementioned; and concluded

* The demife in that cafe was of a *mill*; and the covenant as follows: "That "if the leffee, his executors, &c. fhould before the expiration of the term be "minded to renew, then upon application, &c. the leffor, his heirs or affigns, "fhould grant fuch further leafe as fhould by the leffee, his executors, &c. be "defired, *without any fine to be demanded* therefore, and under the *fame rents and co-* "*venants only*, as in this leafe." *Vide* this cafe, *Brown's Parl. Caf. vol.* 1. *p.* 522.

with

with hoping that the court would incline in favour of the plaintiff.

1778.

Cooke *versus* Booth.

Mr. *Arden contra*, contended, that the covenant could not be extended further than an agreement to renew upon the death of each of the three lives named in the leafe of *December* 22d, 1749. He agreed fuch a covenant was not in itfelf illegal: But it was effential that there fhould be a mutuality of advantage; whereas, here all the advantage was on the fide of the leffee. He faid, the cafes of *Bridges* verfus *Hitchcock* and *Furnival* verfus *Crewe*, were diftinguifhable from the prefent, and the latter indeed rather in favour of the defendant; for there the determination of Lord *Hardwicke* was grounded upon the words "and fo to *continue* renewing, &c. *from time to time*." Here, the words are not fo general: Befides the covenants on the part of the leffee in the original leafe are totally inconfiftent with a perpetual right to renew; for fome of them are, that he will *leave certain things on the premifes*. He cited *Hyde* verfus *Skynner*, 2 *P. Wms.* 196. to fhew, that the court in general would lean againft perpetual leafes: And *Ruffel* v. *Darwin*, 1ft *July* 1767, *coram* Lord *Camden*, where the demife was "for 99 years, or three lives, if they fhould fo long live." The leffor covenanted, that he would, upon the death of *either* of the parties, add a new life, upon payment of 150 *l.* if one only fhould die; 500 *l.* if two, and 1,100 *l.* if all *three* died, at and under the *like rents and covenants*. Lord *Camden* held, that the leffor was under no obligation to renew for more than three lives, and that the covenant of renewal need not be inferted.

Lord Mansfield.—The queftion in all thefe cafes is, Whether "under the *fame rents and covenants*" fhall be conftrued *inclufive* or *exclufive* of the claufe of renewal. And arguments drawn from every part of the agreement are material. Here, the parties themfelves have put the conftruction upon it: for there have been frequent renewals, and in all of them the covenant of renewal has been uniformly repeated. How then fhall the court fay the contrary?

Willes Juftice.—The act of the parties feems to difference this cafe from all the cafes cited. *Here, there have been four or five renewals, all in the fame terms. I do not think otherwife, that *Furnival* verfus *Crewe* would be a fufficient authority alone to determine this cafe; becaufe there, the additional words "and fo to *continue* renewing, *from time to time*, were infert- "ed." But the cafe of *Bridges* verfus *Hitchcock* is very much the

fame

1778.

COOKE *verſus* BOOTH.

ſame as this. For there, the words were, "under the ſame "rents and covenants," and no other words. I cannot ſay that in this country this kind of leaſe ſhould be much favoured, though the inducement for granting them in *Ireland* may be a very good one.

ASHHURST Juſtice.—I think this is a very hard caſe on the part of the leſſor, and there does not ſeem any mutuality as in the caſes of improvement of lands. But as there have been four ſucceſſive renewals, the leſſor himſelf has put his own conſtruction upon the covenant: and therefore is bound by it.

BULLER Juſtice.—I think the caſe of *Bridges* verſus *Hitchcock* decides this: In that caſe, both the Houſe of Lords and the Exchequer determined, that the words, "*under the ſame rents* "*and covenants*" in the *new leaſe*, contained a *perpetual covenant* to renew. So here, I think they muſt be conſtrued to mean a like covenant to renew.

Afterwards, on *Saturday*, *May* 30th, in this term, the court *certified* in theſe words: "We are of opinion, that a like cove"nant for renewal, ought to be inſerted in the new leaſe; "conſequently, that the leaſe offered to be executed by the "defendant, *John Gore Booth*, is not an execution of the co"venant in the leaſe, dated the 22d day of *December* 1749."

MARTIN *verſus* O'HARA.

Saturday, *May* 30.

A ſecond commiſſion againſt a bankrupt, *pending* a *former*, under which he has *not* obtained his *certificate*, is *void*. Where a bankrupt is clearly entitled to his diſcharge, he need not be *ſurrendered* by his bail: the court will, *in the firſt inſtance*, order an *exoneretur* to be entered on the bail-piece.

THIS was a rule to ſhew cauſe why an *exoneretur* ſhould not be entered on the bail-piece, the defendant having become bankrupt ſince the cauſe of action, and obtained his certificate. The defendant, in *July* 1775, carried on the trade of a linen draper, and lived in *London*. In *March* 1776, he became bankrupt, and was refuſed his certificate; before which bankruptcy the cauſe of action aroſe. The defendant then went to *Briſtol*, where he entered into partnerſhip with one *James Wright*, a dealer in cheeſe; and half a year after, became bankrupt again. Under this ſecond commiſſion, which was taken out at *Briſtol*, and which the creditors in *London* knew nothing of, he obtained his certificate.

Mr. *Wallace*, who ſhewed cauſe, argued, that the bankrupt not having obtained his certificate under the firſt commiſſion, the whole proceedings under the ſecond, were void. Conſequently the certificate could be no bar to the action.

1778

MARTIN *versus* O'HARA.

Mr. *Dunning contra*, contended, that if the second commission were irregular, the only mode of defeating it was by application to the Great Seal to supersede it. But that there was nothing in the statutes against bankrupts which prevented a person from having the full benefit of his certificate, however irregular the proceedings might be, as long as they continued in force: And that this was not the proper mode to try whether they were legal or not.

Lord MANSFIELD.—This is an application to the equitable jurisdiction of this court. Formerly the method was, for the bail to surrender the defendant, and then for him to apply to be discharged upon an affidavit, stating the fact of his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity to the commission. But of late, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuity, have ordered an *exoneretur* to be entered on the bail-piece, without the *form* of a regular surrender of the bankrupt by his bail.—Here it is clear that the bankrupt himself would not have been entitled to his discharge, if surrendered: and the bail can never be in a better situation than the principal. An uncertificated bankrupt is incapable of trading or contracting for *his own benefit*. All the property he acquires, belongs to his creditors. If he cannot trade for himself, he cannot be the object of a second commission. 2. The proceedings in this case under the last commission are manifestly a gross fraud and contrivance, on the face of them. The defendant, a *linen-draper* in *London*, after being a bankrupt there, goes to *Bristol*, changes his trade, and enters into partnership with a *cheese-monger*; and within *six months* after, breaks again. A second commission is taken out; not in *London*, where his former creditors would have heard of it, but at *Bristol*, where it might be conducted without their knowledge: And under this commission he obtains his certificate. The whole proceeding is a gross fraud. Even supposing the creditors under the first commission had been informed of *this*, and had been inclined to prove their debts under it, they could not have done so. Therefore, discharge the rule.

BULLER Justice.—I take it to be perfectly clear, that a *second* commission cannot be taken out against an *uncertificated* bankrupt; and for this reason: It would be entirely idle and nugatory. Because all his effects belong to his creditors under the first: And I take this to have been determined in the case of a

1778. lighterman, where the assignees under the first commission recovered a lighter, built by the bankrupt, (being uncertificated,) after a *second* commission sued out *.

MARTIN *versus* O'HARA.

Per Cur. Rule discharged.

* *Vide Evans* versus *Mann, supra,* 569. but no mention is there made of a *second* commission.

Same day.

AVERY *versus* HOOLE.

Declaration, that the defendant used a gun, being an engine to kill and destroy the game. Held *good, after verdict. Quære,* if good upon *a special demurrer* — A verdict will cure *ambiguity*; but it will not aid a case, where the *gist* of the action is *omitted.*

THIS was an action of debt on the game laws, for using a gun to kill and destroy the game. Plea not guilty: and issue thereon. At the trial before Mr. Justice *Gould*, on the Northern Circuit, an objection was taken to the declaration, because it stated only, that the defendant used a gun, *being an engine to kill and destroy the game,* without averring that he *used* it *for the destruction of the game:* Mr. Justice *Gould* thought the objection was *on the record*; therefore, proceeded to try the cause, and the jury found a verdict for the plaintiff.

Mr. *Arden*, on *Thursday, May* 6th, in this Term, moved in arrest of judgment, upon the ground above mentioned; and cited the case of *Rex* versus *Hunt, Pasch.* 15 *Geo.* 3. *B. R. Rex* v. *Gardiner*, 2 *Str.* 1,090.

Mr. *Wallace* and Mr. *Bolton* now shewed cause, and insisted, that this being after trial, the objection was cured by the verdict. In effect, however, the offence was sufficiently charged. For if the words, "being an engine," were read, as they ought to be, in a *parenthesis*, the rest would be an express averment, "that "the gun was used *to destroy the game.*" The cases of *Rex* v. *Hunt, East.* 15 *Geo.* 3. *B. R.* and *Rex* v. *Gardiner*, 2 *Str.* 1,090. *Andrews*, 255. *S. C.* cited in support of the motion, were cases of *convictions*. The *latter* was held bad, because the defendant was convicted of *keeping* only, not of *using*: And the *former* was *given up without argument.* But admitting it had been argued, a conviction and declaration are very different. In *Bluet* v. *Needs, Comyns*, 522. it was expressly held to be *matter of evidence* for the jury, Whether a gun is an engine to kill and destroy the game? and here the jury have pronounced it so. The rule in criminal as well as in civil cases is, that a verdict will supply whatever must of necessity be given in evidence. To this purpose they cited *Alston* versus *Buscough, Carth.* 304. and *Frederick* v. *Lookup*, 4 *Burr.* 2,018.

The

The latter was an action *qui tam*, for treble the value of money won at play, brought by the plaintiff, on behalf of himself and the *poor of the parish of Covent Garden;* and the offence was charged only, at *Westminster aforesaid*, without specifying any parish: And after verdict for the plaintiff was adjudged good. Here, the objection is after verdict; and therefore cured.

1778.

AVERY *versus* HOOLE.

Mr. *Arden*, *contra*, in support of the rule, contended, that where a declaration does not contain a sufficient charge, *verdict* will not help it; and here no offence is charged. All the precedents agree, that the *destruction of the game* must be referred to the *use*, and not to the *engine:* And there is no difference as to the sense of the words, whether they are contained in a declaration or a conviction. In *Buxenden* v. *Sharp*, 2 *Salk*. 662. which was an action for keeping a vicious bull, the *scienter* being omitted in the declaration, was held naught *after* verdict. In *Reason* v. *Lisle*, *Comyns*, 576. the judgment was arrested, because it was only charged in the declaration that the defendant used *a dog* to kill game, without shewing that it was any of the dogs *described by the act*. And in *Hooke* v. *Wilkes*, 2 *Str*. 1,126. it was decided, that this being a penal statute, could not be extended by implication. Upon these authorities, he prayed the rule might be made absolute.

Lord MANSFIELD.—The case of *Rex* v. *Hunt* was given up without argument.—What passed at the trial in this case is material; and shews the true distinction. No objection was made at *Nisi Prius*, that the evidence did not prove the offence; but the objection was, that the offence was not charged in the declaration with sufficient certainty. The judge answered, that the objection, if founded at all, appeared *on the record*, and therefore he would try the cause according to that construction which constitutes the offence. It has been very truly said, that a verdict will not mend the matter, where the gist of the action is not laid in the declaration.* But it will cure ambiguity. Here, according to one method of pointing the sentence, putting a comma after the word "engine," the offence is sufficiently charged; for it will then stand thus: "That the defendant used a gun being an engine for the destruction of the game." And there is no charge in the declaration but according to that construction. This differs widely from the case of a conviction; for there,

 great

1778. Lyery *versus* Hoole. great nicety is required. The court muſt ſee that the offence is within the juriſdiction of the juſtice, and that he has purſued his authority. The caſe of *Frederick* v. *Lookup*, is very ſtrong; becauſe there it was abſolutely neceſſary that the offence ſhould be committed *in the Pariſh*, to entitle the plaintiff to recover; and *muſt have been ſo proved*: After verdict therefore for the plaintiff, the court held it was cured. So here the *uſe* muſt have been *proved* at the trial, or the verdict could not have been found for the plaintiff. It might have been different, perhaps, if this ambiguity had been aſſigned as ſpecial cauſe of demurrer.

Per Cur. Rule for arreſting the judgment diſcharged.

THE END OF EASTER TERM.

On the 3d of *June* 1778, the Great Seal was delivered to *Edward Thurlow*, of the *Inner Temple*, Eſq; his Majeſty's Attorney General, with the ſtyle and dignity of Lord Chancellor. Upon this occaſion he was created a peer, by the title of Lord *Thurlow*, Baron of *Aſhfield*, in the county of *Suffolk*.

Mr. *Wedderburne*, Solicitor General to his Majeſty, ſucceeded Lord *Thurlow* as Attorney General.—And *James Wallace*, Eſq; one of his Majeſty's counſel learned in the law, was appointed Solicitor General, in the room of Mr. *Wedderburne*.

TRINITY TERM

18 GEORGE III. *B. R.* 1778.

BOLOGNE *versus* VAUTRIN.

Friday, June 19th.

The attorney's clerk is an improper person to be bail for the defendant.

THE clerk of the attorney for the defendant in this cause, appeared in court to justify as bail for him; but was rejected as an improper person, upon the principle of the rule of *Mich.* 14 *Geo.* 2. ordering "that no attorney shall be admitted as bail "in any action depending in this court."

MICHELL *versus* NEALE *et uxor.*

Tuesday, June 23d.

Declaration that the defendant on the 6th of *May*, and on *divers other days and times*, *between* that day and the commencement of the suit, *assaulted* the plaintiff, is *bad*.

THIS was an action of assault and battery. The declaration consisted of *three* counts. In the *two* first it was charged, that the defendants on the 6th of *May* 1777, and on *divers other days and times from and between* that day and the commencement of the plaint, made an assault, &c.: and in the *third*, that on the said *several days and times, or on some or one of them*, the defendants made an assault, &c.: The defendants *demurred*, and assigned for special cause, that the assault ought to have been charged on a day certain, and not with a *continuando*.

Mr. *Morgan* in support of the demurrer argued, that the offence being one *single act*, could not be laid with a *continuando*; that no plea but the general issue could be put in to such a declaration; and cited *Butler* versus *Hedges*, 1 *Lev.* 210. *Gillam* versus *Clayton*, 3 *Lev.* 93. *Brook* v. *Bishop*, 2 Ld. *Raym.* 823. 2 *Salk.* 639. S. C. *Monckton* versus *Pashley*, 2 Ld. *Raym.* 976. 2 *Salk.* 638. S. C.

Mr. *Bower*, *contra*, for the plaintiff, admitted the *last* count could not be supported; but as to the *first* he said, there was a difference between a *continuando*, and *diversis diebus et vicibus*.

Here,

1778. Michell versus Neale.

Here the defendants might have pleaded *not guilty* as to *all* the assaults but *one*, and have justified as to that one; as in trespass, *quare clausum fregit*, where a *new assignment* may be made to one trespass, and not guilty pleaded to the rest. *Sed per curiam, non allocatur*. An assault is *one entire individual act*; and cannot be committed at *divers* times. Besides, it is impossible for a defendant upon such a declaration as this, to know whether the plaintiff means to prove one assault only, or twenty: Therefore he cannot be prepared to justify.

Per Cur. Judgment for the defendants.

Saturday, June 27th.

Ex parte Brounsall.

An attorney convicted of *felony* was struck off the roll, though he had been burnt in the hand and suffered imprisonment pursuant to his sentence, *five years* before, and no misconduct imputed to him since.—He is an unfit person to practise as an attorney.

THIS was an application to the court to strike the defendant off the roll of attornies, he having been convicted of stealing a guinea; for which offence he received sentence to be branded in the hand, and to be confined to the house of correction *nine* months.

Mr. Solicitor General, who shewed cause, stated, that the conviction, which was the ground-work of the motion, was at least four or five years ago: since which time no misconduct whatever could be imputed to the defendant: and he argued, that the defendant having received the benefit of clergy and having been branded in the hand, it operated as a statute pardon; therefore, to comply with the application would be to punish the defendant a second time for the same offence. He cited *Serle* v. *Williams*, *Hob.* 288. where it was held, "that a clergyman could not be "deprived for a felony, for which he had received the benefit of "clergy:" And *Hobart* said, "that an action would lie against "any person for calling him a thief," as was resolved in *Cuddington* v. *Wilkins*, *Trin.* 13 *Jac.* 1*. He cited also Sir *T. Raym.* 370. Mr. *Le Blanc*, in support of the motion, stated, that this was a prosecution by the magistrates of the county, and not by the prosecutor of the indictment for the felony. And that the only object of it was to prevent the neighbourhood from receiving any injury.

Lord Mansfield.—This application is not in the nature of a second trial or a new punishment. But the question is, Whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a justice of peace, the con-

* *Vide* this case, *Hobart*, 81.

viction itself would not remove him from the commission; but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges.—Lord *Mansfield* on this day said, "We have consulted all the judges upon this case, and they are unanimously of opinion, that the defendant's having been burnt in the hand, is no objection to his being struck of the roll. And it is on this principle; that he is an unfit person to practise as an attorney. It is not by way of punishment; but the court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute."

1778.

Ex parte BROUNSALL.

REX *versus* ROWLAND PHILLIPS.

Same day.

If an officer on the impress service fire *in the usual manner* at the *hall-yards* of a boat, in order *to bring her to*, and kill a man, it is only *manslaughter*.

UPON an indictment against the defendant, at the *Lent* assizes, at *Exeter*, for the county of *Devon*, 1778, for the murder of *William Collier*, the jury at the trial before Mr. Baron *Perryn*, found a special verdict, stating in substance as follows: "An order of council for impressig seamen. A warrant made "in consequence of it to captain *Milbank*, commander of his Ma- "jesty's ship *Princess Royal*, who, by indorsement deputed *John* "*Nasmith*, fourth lieutenant of the *Princess Royal*, to execute it. "That *William Collier*, the deceased, was a fisherman: The de- "fendant was a midshipman belonging to the *Princess Royal*, "and on the 25th of *September* 1777, was sent in the brig *Hope* "(a tender) commanded by lieutenant *Nasmith*, into *Torbay*, to "impress seamen. That he went from the tender into a boat, by "the directions of the lieutenant, to put people on board the fish- "ing boats as they returned from sea, who might carry them "under the stern of the tender that the lieutenant might examine "whether they had any protections. That he put *Francis Graham*, a "quarter-master, on board the boat or smack of the deceased; that "the smack at first made a feint of proceeding towards the tender; "but instead of continuing in that course, she afterwards put out "to sea, with the said *Francis Graham* on board. That *Graham*

"then

1778.

Rex *versus* Phillips.

" then waived his hat, by way of signal of distress, and for assistance: Upon which the defendant went on board another fishing-boat, with the quarter-master as his assistant, armed with a musquet and ball, and two cutlasses; and *gave chace* to the deceased for *three hours*; in the course of which time, the defendant fired six or seven shots, at the distance of a quarter or half an hour between each, *for the purpose of bringing the smack of the deceased to.* That the *hallyards* of the smack had been cut by *Francis Graham*, and that the smack was in the act of lying to. That *within the distance of sixty yards*, the defendant fired a musquet loaded with ball, *the sea then running very high*, and *shot* the *deceased* on the left side of his head. That *Francis Graham* was at that time standing close to the deceased. That the defendant said, 'if they did not bring to, he would fire at *the man at the helm*; but if he could get *Graham* out of the vessel, he might go to hell.' That before the defendant fired the musket, the master of the *Industry* fishing-boat desired him not to fire, but the defendant did fire; the deceased fell, and then one *John Desent* said, 'you have killed a man:' Upon which the defendant said, 'do you think I meant it.' That before the last firing, a *struggling* was seen between *Francis Graham* and the deceased, and that there was an apprehension *Graham* would have been thrown overboard: That a hat and four bludgeons were seen floating on the sea. That the defendant fired from a musquet loaded with ball, *as is usual in the navy, to bring the smack of the deceased to*, and to *hit the hallyards.*"

No counsel appeared on the part of the prosecution.

Mr. *Baldwyn* for the prisoner argued, that the facts found, amounted only to *manslaughter*. To constitute murder, there must be malice, either *express* or *implied*. Lord *Coke*, 3 *Inst*. 47. defines murder thus: "When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being under the King's peace, with *malice aforethought* either *express* or *implied*:" And according to Lord *Hale*, *vol*. 1. 449. "murder is killing a man of *malice prepense*." But the unfortunate act here, has nothing of express or implied malice within the above definition. There is no appearance of ill-will to the deceased. The firing was not done in an uncommon manner, or with unusual weapons. He cited *Hawk. Pl. C.* 85. *sect*. 50. and *Kelyng*, 60.

Lord MANSFIELD.—It is impossible upon this special verdict to say, that the defendant is guilty of more than manslaughter.

For

For it is exprefsly found, that he fired in the *ufual manner to bring veffels to*, and to *hit the hallyards*.

1778.

REX *verfus* PHILLIPS.

Whereupon, the defendant was immediately arraigned, and upon praying the benefit of clergy, Mr. Juftice *Willes* pronounced the fentence for burning him in the hand, which was executed in the face of the court, and he was then difcharged.

REES *verfus* ABBOTT.

Tuefday, June 30th.

Declaration that the defendant and another made their promiffory note, by which they *jointly* or *feverally promifed* to pay, is good.

THIS was a writ of error from the *Common Pleas*, in an action upon a promiffory note made by *two*, and the action brought againft the defendant, the now plaintiff in error, *only*, who let judgment below go by default. The declaration ftated, that the now plaintiff in error and another, made their promiffory note, by which they *jointly or feverally* promifed to pay.

Mr. *Wood*, for the plaintiff in error, objected, that it was not fufficiently charged that he had made any promife to pay the note in queftion; and cited *Butler* v. *Maliffey*, 1 *Str*. 76. and *Ovington* v. *Neale*, 2 *Str*. 819. as exprefsly in point.

Lord MANSFIELD.—If *or* is to be underftood in this cafe as a *disjunctive*, who is to *elect*, whether the note fhall be *joint* or *feveral?* Certainly the perfon to whom it is payable. If fo, the plaintiff has made his election. But *or*, in this cafe, is *fynonimous* to *and*. They both promife that *they*, or *one* of them, fhall pay: Then *both* and *each* is liable *in folidum*. The nature of the tranfaction forces this conftruction. It is faid that Judges fhould be *aftute* in furtherance of right, and the means of recovering it. And therefore one is afhamed to fee either hitch or hang upon pins or particles, contrary to the true manifeft meaning of the contract.

BULLER, Juftice.—If the note had been a joint note only, not a joint and feparate note, the defendant could only have pleaded in abatement. It would not have been error.

Per Cur. Judgment affirmed.

1778.

DOE, *ex dim.* HANSON, *versus* FYLDES.

Tuesday, June 30th.

One devises a messuage and lands to her eldest daughter *A* and the *heirs of her body for ever*; and for want of such issue to her daughter *B.* and the *heirs of her body, for ever*, and so on to her *third* and *fourth* daughter in *tail*, CHARGED nevertheless with 180*l.* to be *levied* out of the first annual profits, and to be divided equally amongst the three younger daughters: And that the executors should stand *seised* of the said messuage and lands for *so long time* as they or their assigns should have *raised* the said sum, or, *so long as until* the same should be *paid* by the said *A.* or *her heirs*; and immediately after the raising, or other payment of the said sum by *A.* or her heirs, then that *A.* and her heirs should enjoy the said messuage, &c *for ever*; allowing the three younger daughters and a cousin, the use of the kitchen and the rooms over till they married. Held, that *A.* took only an *estate tail.*

UPON a rule to shew cause why a new trial should not be granted, the case appeared to be as follows: This was an ejectment, brought for an ancient messuage and tenement and certain lands in *Prestwicke*, in the county of *Lancaster*, which formerly belonged to the widow *Scolefield*, who had four daughters. At the trial before Mr. Justice *Gould*, at the *Lent* assises at *Lancaster*, 1778, it appeared that the widow *Scolefield* died a year *before* the statute of frauds and perjuries was made; and by her will, bearing date the 20th of *June* 1676, after recitng that she was seised in fee of the premises in question, she devised them in the following words: "It is my will and mind, "and I do hereby give, bequeath, grant, alien, release, and con- "firm, all and every part of the said messuage, tenement, and "all and every the lands, &c. thereunto belonging, unto my el- "dest daughter, *Alice Scolefield*, and the *heirs of her body* lawfully "to be begotten *for ever*: And for *want of such issue*, then to my "daughter *Anne Scolefield*, and the *heirs of her body* lawfully to be "begotten *for ever*: And for *want of such issue*, then to my third "daughter *Margaret Scolefield*, and the *heirs of her body for ever*: "And for want of such issue, then to my youngest daughter, "*Judith*, and the *heirs of her body for ever*; and for *want of such* "*issue*, then to the *right heirs* of me the said *Alice Scolefield*, for "ever; *charged* and chargeable, notwithstanding, with the full "sum of *nine score pounds*, to be levied and raised out of the *first* "clear annual and *yearly issues and profits* of all and every the said "messuage, tenement, lands, and premises aforesaid, and after "my decease to be equally distributed amongst my three young- "est daughters, *Anne*, *Margaret*, and *Judith*, as the same shall "be so raised, &c. for and towards their maintenance and better "preferment. And it is my will and mind, that my executors, "hereinafter mentioned, shall and may stand and be seised, pos- "sessed, and interested of, and in, all and every the said mes- "suage, lands, tenements, &c. with their appurtenances, from "and immediately after my decease, for so long a time as until "they or their assigns shall, may, or lawfully might have fully "*raised*, received, and taken up the aforesaid sum of *nine score* "*pounds*, over and above all costs and charges, as the same shall

"be

1778.

Doe *versus* Fyldes.

"be so raised, to and for the benefit of my said daughters *Anne*, "*M.* and *J.* equally, or so long as until the same shall or may "be *paid* and discharged by my *eldest daughter*, *Alice Scolefield* or "*her heirs*: and *from and after* the *raising* and receiving or *other* "*payment* of the said sum of nine score pounds by my daughter "*Alice Scolefield* or *her heirs*, it is my will and mind, that she and "*her heirs* shall have, hold, and enjoy the said messuage, &c. *for* "*ever*: only allowing my three youngest daughters, *Anne*, *M.* "and *J.* and my cousin *Edmund Scholes*, the kitchen and the "rooms over belonging to it, to have and dwell in, until they "shall happen to be married, and no longer." The ejectment was brought by the lessor of the plaintiff, as heir of the body of *Alice Scolefield*, the eldest daughter, against the defendant, who was a purchasor or creditor of *Alice Scolefield*. At the trial, the defendant insisted, that under this will, *Alice* took a fee. It was admitted, that the nine score pounds were paid between the death of the testatrix and the year 1688; and in order to shew that the intention of the will was to give *Alice* a fee, the defendant *offered evidence*, that in the year 1676, the testatrix, having then an estate *for three lives* in the premises, purchased the *reversion* for 120*l.* That an estate for three lives is considered as of equal value with the reversion of such estate; and therefore, the full value of the whole was, at that time, about 240*l.* The inference intended to be drawn from this was, that after payment and distribution of the 180*l.* amongst the three younger daughters, there would remain only the value of 60*l.* for the eldest. Therefore, supposing her to take a fee, she would have no more than her sisters; but each would take an equal interest. On the other hand, as the *annual value* was but 17*l.* it was impossible the testatrix could intend the eldest to be so long without any benefit at all, as she necessarily must be, before the rents and profits would amount to the sum of 180*l.* This evidence was rejected by Mr. Justice *Gould*, and a verdict was found for the plaintiff, subject to the opinion of the court upon a motion for a new trial, without costs, on the whole of the case.

This case was spoken to last term, by Mr. *Mansfield*, Serjeant *Walker*, Mr. *Lee*, and Mr. *Bolton*, for the plaintiff; and by Mr. *Wallace*, Mr. *Dunning*, Mr. *Davenport*, and Mr. *Wilson*, for the defendant. The court took time to consider; and on the last day of the term Lord *Mansfield* said, that both points of the case required great attention; therefore ordered it to stand in the paper for argument this Term.

It

1778. It was now argued by Mr. *Lee* for the plaintiff, and Mr. *Wilson* for the defendant. The substance of the arguments was as follows:

Doe *versus* Fyldes. Mr. *Lee*, after stating the will, said, The two questions are, first, Whether *Alice Scolefield* took an *estate tail* or an estate *in fee*, considering the whole of the will together, without regard to any foreign *extrinsic* circumstances? *Secondly*, Whether the court is at liberty to regard such *extrinsic circumstances*, as were offered to be proved at the trial, respecting the will. As to the first point, he contended, that *Alice Scolefield* took an *estate tail*. The testatrix, after stating herself to be seised in fee-simple, devises to *Alice Scolefield* expressly in tail. So far it is clearly an estate tail. Then comes the charge of nine score pounds for the younger daughters, and that the executors shall be seised till the said sum shall be raised or paid. Then that *Alice Scolefield* and her heirs shall enjoy, and that she and her heirs shall permit the sisters to have the use of some particular rooms.—It is a general rule, that when land is given, charged with money to be paid out of the *annual profits*, *that* is not a reason for construing the devise to extend further than the words express. For *Collier*'s case, 6 *Co.* 16.*a.* reported also in *Cro. Eliz.* 378. shews, that the only reason for extending the construction is, because otherwise the devisee may lose by the devise; and that can only happen where a *gross sum* is to be *previously* paid. *Freak* v. *Lea*, 2 *Lev.* 249. *Pollexf.* 553. S. P. Even the charge of a gross sum, not payable merely out of the rents and profits, will not make it a fee, if a contrary intention appears. *Bacon v. Hill*, *Cro. Eliz.* 497. But here is no charge of a gross sum, so as to make it doubtful whether the devisee might be a loser: for this is to be paid out of the *first rents and profits*.—The word "heirs" in the latter part of the will plainly is meant to give to all her children successively, to charge the land with a sum of money for the younger, that they all, as executors, should hold till the money should be paid, and then, that the eldest should take, in the manner prescribed in the beginning of the will. In *Webb* v. *Herring*, 2 *Cro.* 415. the word "heirs" was construed to mean "heirs of the body" (which had been mentioned before in the will); the limitation over being to the testator's heir at law. *Tyte* v. *Willis*, *Forrest. Rep.* 1. S. P.—It is a certain and invariable rule, that a will must be construed in such a manner as that every part of it may stand; but if the latter part of this will should be construed to give a fee-simple, it would entirely overturn the former part; though it does not appear that any new circumstances occurred to the mind of the testatrix. Therefore, *Alice* took *only* an *estate tail*.

As

As to the point of evidence, he insisted, that the court could not go into the circumstances of the family in order to make an equal division, nor receive extrinsic evidence. He again mentioned *Collier*'s case, where it is said, " that the value is imma- " terial;" and *Wellock* v. *Hammond*, *Cro. El.* 204. to the same effect. He also relied much on Lord *Cheney*'s case, 5 *Co.* 68. for the general principle, " that the construction of wills ought to " be collected out of the words of the will in writing, and not " by any averment out of it." If circumstances out of the will are to have any weight, it will never be certainly known by the parties interested, by counsel advising them, or by purchasers, what title can be maintained under it. The case of *Cole* v. *Rawlinson*, 1 *Salk.* 234. shews, that Lord *Holt*'s opinion was, that the intent of the testator was to be collected from the words of the will, not from extrinsic circumstances. To this point also, is the case of *Brown* v. *Selwyn*, on appeal, in the House of Lords, from a decree of Lord *Talbot*.

This evidence was offered to shew, that the division of her property by the testatrix would be more equal, if this devise were to be construed a fee. But it is nothing to the court, whether the division is equal or unequal, prudent or imprudent; it is only material to them, what appears to them to have been the will of the testatrix, not what it ought to have been. Lord *Bacon*'s distinction between *ambiguitas latens*, and *ambiguitas patens*, is a right distinction, and ought to be adhered to. As to the case of *Oates ex dim. Wigfall* v. *Brydone* and others, 3 *Burr.* 1,895. there, it only appears that the value was unnecessarily found. Upon these grounds, he prayed the rule might be discharged.

Mr. *Wilson*, for the new trial, began with the point of evidence; for, he said, if that could be once established in his favour, it would manifestly appear that the testatrix meant to give *Alice Scolefield* an estate in *fee*. He laid it down as a general rule, that where it appears that a testator had any particular thing or circumstance in contemplation, the court may inform themselves of that circumstance, in order to be as fully acquainted with it as the testator was. Now where a testator charges his estate with the payment of *money*, he has always the value in *contemplation*: Therefore, in this case, the land being charged, its value ought to be enquired into: In *Collier*'s case it is said, " That where the land is only of the value of three " or four pounds a year, and 20 *s.* or 30 *s.* only are charged upon " it, there the devise is construed to be for life:" which shews

that

1778. that the value may be enquired into; and that in a doubtful cafe, it may depend on the value. To this effect are *Kerman* verfus *Johnfon*, *Stiles* 281 & 293: and alfo *Ivy* v. *Gilbert*, 2 *P. Wms*. 13. *Prec. in Chanc*. 523. S. C.—In Lord *Cheney*'s cafe, though fome fuch doctrine might have fallen from the court, as Mr. *Lee* mentions, yet the main queftion was different from this. In fuch a cafe as the prefent, there can be no danger in admitting parole evidence; becaufe the value of an eftate is a thing notorious, and any impofition in that refpect might be eafily detected. Lord *Holt*, in *Cole* v. *Rawlinfon*, lays down the rule of evidence too largely; befides his opinion was extrajudicially given, and the other three Judges diffented from it. Parole evidence may be given to rebut an equity.

Doe *verfus* Fyldes.

Here the court afked Mr. *Wilfon*, What ufe he meant to make of this evidence?

Anfwer. To fhew the eftate was fo fmall, that if it was meant to be given in tail only, the eldeft daughter might lofe her provifion: For if fhe does not pay nine fcore pounds immediately, fhe muft wait till it is paid out of the profits, which would have taken many years. The executors could not have raifed the fum by mortgage, as the only means prefcribed are out of the firft clear annual profits. The teftatrix at firft intended to give an eftate tail to all her children fucceffively; then fhe feems to have confidered that the younger were to come in for their legacies of money immediately; and therefore to have meant to give the land to the eldeft in fee. The latter devife, (confidered in itfelf), is clearly a devife in fee. The rule, that where a doubt arifes on any part of a will, it muft be conftrued fo that every part may ftand, is right, where it applies: But here is no doubt on the meaning of either claufe; the difficulty lies in the latter claufe being inconfiftent with the former. The cafes cited on the other fide, where the word "heirs" had been conftrued to mean heirs in *tail*, (they having been mentioned before,) were fo determined becaufe it appeared in thofe cafes that the teftator did not know the legal diftinction between the word "heirs," and the words "heirs of the body;" but in this cafe it manifeftly appears that the teftatrix knew that diftinction; and, therefore, if fhe had meant in the latter claufe to give an eftate tail, fhe would have ufed the words, "heirs of "the body" again.

Mr. *Lee* in reply.—The doctrine laid down in fupport of the rule, tends to fubvert every eftablifhed rule in the conftruction

of wills. The principle which diſtinguiſhes between a charge of money to be paid out of the rents and profits, and a groſs ſum to be paid generally, is thoroughly ſettled; though now attempted to be overturned.

Lord MANSFIELD.—All the caſes, in which the implication ariſing from the condition of paying money, is admitted, are caſes where the queſtion was, Whether the deviſees took an eſtate for *life* or in *fee?* and not whether they took an eſtate in *tail*, or in *fee*.

Mr. LEE.—As to the argument attempted to be drawn from the teſtatrix uſing the words, "heirs of the body," in the former part of the will, and not in the latter; it is an inference equally juſt, to ſuppoſe that as ſhe firſt ſtates herſelf to be ſeiſed in fee ſimple of the lands, and does not uſe ſimilar expreſſions in the latter clauſe in queſtion, ſhe could not mean by that clauſe to give an eſtate in fee; if her ſuppoſed knowledge of the technical expreſſions is to be argued from at all.

Cur. adviſare vult.

On this day Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows: A motion for a new trial has been made upon two grounds: Firſt, That upon the true conſtruction of the words of this will, *Alice Scolefield* took an eſtate in fee ſimple, and not an eſtate tail only, as contended on the part of the leſſor of the plaintiff. Secondly, That ſuppoſing, on the face of the will, the latter to be the true conſtruction, yet, if the defendant were let in to prove the value of the eſtate at the time of the deviſe, ſuch proof would vary the conſtruction, and therefore, that ſuch extrinſic evidence ought to have been admitted at the trial.

As to the *firſt*, it is plain that the teſtatrix, at the time of making her will, had legal aſſiſtance; but it was ſuch aſſiſtance as ſerved only to confound, by making her uſe all the *dragnet* words of conveyancing, without knowing the force of them. For ſhe intermixes all the words that belong to grants and deeds. After the preamble to her will, ſhe deviſes thus:—Here his Lordſhip ſtated the will, and proceeded as follows: Now the ſingle queſtion upon the conſtruction of this will is, "Whether "the words, '*heirs of Alice Scolefield*,' *thrice* repeated relative to "to the redemption of the term veſted in the executors, ſhall be "conſtrued to refer to the ſpecial deſignation of the heirs, to "whom the eſtate is deviſed in the *beginning of the will*; or to "introduce a *new* and more *general denomination of heirs*, and to

 "amount

1778. "amount to a revocation of the exprefs eftate tail, given in the beginning of the will, with all the remainders over to the three "fifters, and the reverfion in fee to the teftatrix and her right "heirs?" It is manifeft that the firft devife is an exprefs eftate tail to each of the four daughters fucceffively, and that the teftatrix meant to charge the firft eftate tail to her eldeft daughter, with the fum of 180 *l.* for the *immediate* benefit of her other three daughters: For the devife is in thefe words, "charged and "chargeable notwithftanding, &c." In the fame claufe fhe particularly expreffes her intention, that this fum fhould come out of the *poffeffion*, and not out of the *inheritance*: Becaufe it is to be raifed *out of the firft and clear yearly and annual profits*. To effectuate this intention, fhe is advifed to create a term in her executors to receive the rents and profits *quoufque*. So that there are in the cleareft words fucceffive eftates tail, fubject to this charge; or, if I may ufe the expreffion, this fum of 180 *l.* is to be raifed *previous* to any of the eftates tail. If the matter had refted there without any other words in the will at all, *Alice*, or the heirs of her body, would have had a right to redeem the term vefted in the executors; for it was an incumbrance prior to their taking poffeffion under the eftate tail. Of courfe, if they raifed the money, they would have a right to have the term furrendered or affigned. The teftatrix, when fhe mentions this payment, makes no *new* devife, but only fuppofes it a thing that may happen: For fhe fays, "That her executors fhall ftand pof-"feffed, that is, receive the rents and profits till they or their "affigns fhall have raifed this fum; or for fo long time as till "*Alice Scolefield* and *her heirs* fhall have difcharged the fame; "after which payment, fhe and her heirs fhall enjoy the faid mef-"fuage, &c. for ever." What is to be paid or difcharged? A fum of money to the three younger fifters. Who is to be hurt if it is not paid? *Alice Scolefield* and the heirs of her body. Who was to pay? *Alice* and the heirs of her body: And it is to be paid to thofe who would be her heirs if fhe had no iffue. The word "*heirs*," therefore, in this part of the will, is ufed in contradiftinction to the fifters. If the word "heirs" is fo ufed in the firft place, it muft be fo ufed in the feveral other places that follow. Nothing is to be implied from the additional words "*for ever*;" becaufe that expreffion is repeated by the teftatrix in the devife of each of the eftates tail. The nature of the provifion affords a ftrong argument, that fhe did not mean to change the fenfe of the word "heirs" in this part

DOE *verfus* FYLDES.

of

of the will, and to give a *fee simple*. Because it would be absurd and nonsensical to make a distinction between raising money by rents and profits, or by mortgage or sale, or charge on the inheritance, where the first taker has *a fee simple*: What does it signify how it is raised? But where the *possession* and the *inheritance* are *different*, a direction to raise a sum of money out of the rents and profits, is a burthen thrown upon the possession in favour of the inheritance. As where an estate is given to *A.* for life, remainder to *B.* in tail, and a charge is made upon the rents and profits, there the estate of tenant for life goes in ease of the inheritance. The testatrix here might not think of a common recovery. She appears to have meant that her family estate, which was but a small one, should go to her family clear and unincumbered. What knowledge she had, which induced her to think that *Alice* could discharge this sum of 180 *l.* is not apparent, nor is it material: Her object certainly was to have the estate free from it. This seems to us to be the true construction of the will *upon the face of it*.—But at the trial, *extrinsic evidence* was offered to shew, "That the estate in question, at the "time of the devise was worth but 240 *l.*; and if so, supposing "the estate to be sold, each daughter would have an equal share "(60 *l.*); and from thence it is inferred, the testatrix meant by the "subsequent devise to give a fee simple to the eldest daughter." There is no occasion in this case to go into the particular exceptions out of the general rule, "That a will shall be construed "by what appears upon the face of it, and *not* upon *circumstances* "or matter extrinsic;" because the extrinsic matter here proves nothing at all. It lays indeed a circumstance before the court which might have its weight, if the court were called upon to make a will for the testatrix. But *that* the court cannot do. If *she* has not made the shares equal, the court cannot say they shall be so. Who knows what provision the eldest daughter had from her father before? Or who can say she had none? It is plain the *testatrix did not mean* that all the daughters should take *equally*; if she did, she would either have made no will *at all*; or have directed the estate to be sold and divided equally amongst them. But she has made an *unequal* provision; for she has given 10 *l.* more to her daughter *Judith* than to the rest; and she gives the youngest daughters the nine score pounds intended for them immediately, and the eldest nothing till they are paid. The evidence offered at the trial therefore, does not lay a foundation to imply that *Alice* was to take a fee. It is not in the least like the

1778.

DOE *versus* FYLDES.

1778. Doe *versus* Fylder.

cafes where the court has inferred a neceffary implication of an eftate in fee, from a devife of lands without any words of limitation, where the lands are charged with a grofs fum. The doctrine in thofe cafes begun when the modification of ufes was by way of condition; and charging a devifee with the payment of a grofs fum was looked upon as a condition, the non-performance of which amounted to a forfeiture of the eftate: The direction was to pay a fum of money by way of [illegible], and the heir entered for the condition broken. W[illegible] [illegible]tator ufes no words of limitation; there the [illegible] the cafe of grants and deeds, that without words o[illegible] fhall be for life and for life only, takes place. B[illegible] fe of a will, the manifeft intent of the teftator is decif[illegible], [illegible] need not be expreffed in any formal words, the certainty [illegible] teftator muft mean a bounty and benefit to his devifee, is fuff[illegible]ient to fupply the want of a formal limitation. But there never was an inftance of fuch an implication, where an exprefs eftate for life, or an exprefs eftate tail is given in terms; and here, it is an eftate tail with feveral remainders over. We are therefore unanimoufly of opinion, that the eldeft daughter took only an eftate tail, and that the evidence offered at the trial was totally nugatory and irrelevant.—The confequence is, that the rule for a new trial muft be difcharged.

Friday, July 3d.

VICARS *verfus* HAYDON, Leffee of CARROL, in Error.

After judgment in ejectment from *Ireland affirmed*, this court amended the declaration by enlarging the term, tho' the record was remitted to *Ireland*.—A writ of *fuperfedeas* was iffued to the former *mittimus*, and a new writ of *mittimus* was awarded to the Judges of *B. R.* in *Ireland*, enclofing the tenor of the record fo amended. The whole upon payment of cofts by the party applying.

IN *Michaelmas* Term 1762, *Carrol*, in the name of *Haydon* his leffee, brought an ejectment in *B. R.* in *Ireland* for lands there, and laid the demife to be for 15 years from the 25th of *November* 1762. In the fame Term, an injunction was granted by the court of *Exchequer* in *Ireland*, at the inftance of *Vicars*. On application to the court, *Carrol* was permitted at the *Summer* Affizes in 1768, to try the ejectment, execution being ftaid till further order; and the plaintiff had a verdict. A new trial was moved for and refufed: Whereupon *Vicars* brought a writ of error in this court; and the judgment below was affirmed. *Carrol* proceeding to get poffeffion of the premifes, notwithftanding execution

had

had been stayed by order of the court of *Exchequer* in *Ireland*, was, in 1769 prevented from so doing, by further injunction; and dying in 1770, the injunction bill was revived against his representatives. In *Michaelmas* Term 1777, the cause in the court of *Exchequer* in *Ireland* was heard, and *Vicars*'s bill dismissed: But *thirteen* days before the dismission of the bill, the *term* in the ejectment *expired*. In *Easter* Term 1778, which was after the writ of error brought, and before the record was remitted, an application was made to the court of *King's Bench* in *Ireland*, to amend the record by enlarging the term; which was refused, because the record of the judgment was here; and the court there said, "they never amended after "a writ of error was brought, and the record sent over to *Eng*-"*land*. But the application to amend must be made here."

The record was afterwards remitted to *Ireland*. It was then moved in this court by Serjeant *Walker* to amend the record, by enlarging the term in the declaration from *fifteen* to *twenty years*.

Mr. *Dunning* and Mr. *Lane* now shewed cause, and objected. 1. That as the record was sent back to *Ireland*, *this* court could not amend. Pending an ejectment the court may enlarge the term; but here the cause is determined. Therefore it cannot be done but by consent: And cited 1 *Salk.* 257. as in point. They also took a distinction between a motion to enlarge a term *before* it is expired, and *after*, which was the case here. For *that* is more properly making a *new term*.

Mr. *Solicitor General*, and Serjeant *Walker*, *contra*, in support of the rule cited *Doe* versus *Pilkington*, *East.* 9 *Geo.* 3. 4 *Burr.* 2,447. where the demise was laid *before* an entry made to avoid a fine, instead of being laid *after* the entry, and it was too late to make a new entry: And the declaration was amended. *Oates* v. *Shepherd*, 2 *Str.* 1,272, where the term was altered without consent from five years to ten years: And *Roe* versus *Ellis*, *East.* 14 *Geo.* 3. *C. B.* where the declaration counted of a term expired twelve years before the action brought, and was amended by the writ*.

Lord MANSFIELD.—You have not touched upon the only doubt I have, which is, Whether, being a record from *Ireland*, this court can amend it? For though the record is fictitiously here, it is not so in fact.

* *Vide* this case since reported, 2 *Black. Rep.* 904.

1778. To this it was anſwered, that in *Bac. Abr.* tit. *Error*, 203. it is ſaid, "that when the tranſcript is come ſafe from *Ireland* and "entered on the rolls of this court, it is a perfect record here." That in *Yelv.* 118. a precedent was ſhewn of a record removed from *Ireland*, remaining here. And they cited *Meredith*'s caſe, 1 *Ventr.* 217. where a judgment given in *Ireland* was amended by this court.

VICARS *verſus* HAYDON.

Lord MANSFIELD.—The ſingle doubt is upon the *form*. For the record is gone back to the court of *King's Bench*, in *Ireland*, and the whole of it is ſuppoſed to be ſent there. Therefore *they* muſt iſſue the ſubſequent proceſs. Upon a writ of error to the Houſe of Lords from this court, a *tranſcript* only goes up: And the record is ſuppoſed to be ſent back again hither; and if the judgment is affirmed this court muſt ſue out execution. On a writ of error from the *Common Pleas* though a tranſcript only is removed, this court may award execution. Upon a writ of error from *Ireland*, in judgment of law the record is removed here; but in fact a tranſcript only comes over; and when the judgment is affirmed, it is ſent back. In the caſe of the bill of exceptions*, I had occaſion to enquire particularly into the form, and had ſeveral letters from Lord *Annaly* upon the ſubject. And it is as I have ſtated. When the judgment is affirmed, a mandatory writ iſſues from hence to the *B. R.* in *Ireland*, reciting the whole record and proceedings, and commanding them to do execution, by which the cauſe is reſtored to that court. In the caſe of Sir *Thomas Broughton* †, which went from this houſe to the Houſe of Lords, after the Houſe had affirmed the judgment, it was ſuppoſed a miſtake had been committed by the Houſe, and it was wiſhed to be enquired into; but the record was come back to this court.—If the court can do what is aſked in this caſe, it ought to be done: It is mere matter of form. We will conſider of it.

The next day Lord *Mansfield* ſaid, The court had looked into the caſes, and that the proper mode of relief was according

* Symmers *et al. verſus* Regem, *ſupra*, 489.

† The name of this caſe was *St. John* v. *Biſhop of Winton*. Mr. Juſtice *Blackſtone* in his report of this caſe, vol. 2. 933, ſays, "A day or two after "the judgment was affirmed, a motion was made in the Houſe of Lords to re- "hear the cauſe, it being alleged that the majority of the Lords preſent were clear- "ly for reverſing the judgment, though by ſurpriſe they did not divide the Houſe. "But the fact being not clearly aſcertained, and alſo for the danger of ſuch a "precedent, the motion was withdrawn by conſent."

to the following rule, which his Lordship pronounced; "That "upon payment of the costs of this application to the plaintiff "in error (to be taxed by the Master) the defendant in error be at "liberty to amend the record in this cause, by striking out the "word "*fifteen*" in the declaration, and inserting, instead there-"of, the word "*twenty*." And that a *supersedeas* issue, at the "expence of the defendant in error, to the writ of *mittimus* here-"tofore sent to the Judges of the court of *King's Bench* in *Ire-"land*; and that another writ of *mittimus* issue, at the expence "of the defendant in error, to the Judges of the said court, "enclosing the tenor of the record so amended."

1778.

VICARS *versus* HAYDON.

N. B. The *supersedeas* was general, *quia improvidè emanavit*, without assigning any reasons.

GOSLING *versus* Lord WEYMOUTH.

Saturday, July 4th.

Peers may be sued in B. R. by original bill.

IN debt upon bond by bill the defendant pleaded to the jurisdiction of the court, because a Peer of the realm can only be sued by original writ, and not by bill.—Demurrer and joinder in demurrer.

Mr. *Davenport* in support of the demurrer insisted that by the stat. 12 & 13 *Wm.* 3. *c.* 3. in case of dissolution or prorogation of parliament, or in case of adjournment for more than *fourteen* days, the same process was given against Peers as against other persons; and cited *Say* v. *Lord Byron*, *Sayer's* Reports 63.

Mr. *Wood contra*, for the defendant, in support of the plea contended, that the object of the stat. 12 & 13 *Wm.* 3. *c.* 3. was not to introduce any new process against the Peers of the realm, or to extend the jurisdiction of the court, as against them, further than it went before. That where Peers were meant to be included, they were named in the statute; therefore where not named, they were not meant to be included. That the *second section*, which gives the original bill against persons entitled to privilege, speaks only of *knights*, *burgesses*, *citizens* and *others*, having privilege. Therefore it could not extend to persons of higher rank.—He entered into the history of the act, and said, several amendments were made by the Lords, and particularly that they struck out that part which related to the alteration of the *process* as against them *; and that, as the act now stands, Peers could only be proceeded against during the times

* *Vide* Journals of the House of Commons, vol. 13. 567.

mentioned

1778.

GOSLING *versus* Lord WEYMOUTH.

mentioned in the act, in the same manner, as out of time of privilege, *before* the act. He said, he could not find that this court was entitled to proceed by bill before this statute. That neither Lord *Coke*, nor Mr. Justice *Blackstone*, took notice of any such proceeding against Peers. And it was clear that before the statute, members of the House of Commons could not have been sued by bill. It would be strange therefore if Peers could.

Lord MANSFIELD.—The note I have of the case of *Say* v. *Lord Byron* is as follows: "*Mich.* 26 *Geo.* 2. *B. R.* Mr. *L. Robinson* "moved (upon an affidavit that the plaintiff had sued out two "writs of *distringas*, whereupon the sheriff had levied 40 *s.* and "4 *d.* and that no bill was filed,) for a rule to shew cause, why the "said two writs should not be quashed, and the money levied "thereon be restored. He objected that a Peer ought not to be "sued by bill, but by original writ: And that the stat. 12 & 13 "*Wm.* 3. *c.* 3. does not make any variation in the proceedings "against *Peers*, but respects, in this particular, *commoners* "*only*.—Mr. *Stowe* shewed cause, and the rule was enlarged.— "Upon shewing cause at a further day, the court declared that "there were many precedents of actions against Peers of parlia- "ment for many years before the statute of *Wm.* 3. as certified "by the Master, and Mr. *Day* the clerk of the rules: And said, "why could not the court support its ancient jurisdiction, as "well as the court of *Exchequer* hold plea as *debitor domini regis*? "And the court in that case discharged the rule." This is an authority in point. The original bill was the common law process.

Per Cur. Judgment *quod defendens respondeat ouster*.

Same day.

DOE *ex dim.* JUPP *versus* ANDREWS.

If the defendant's attorney who is a subscribing witness to an agreement upon which the plaintiff brings his ejectment, refuse to give evidence of his attestation, &c. upon service of a *subpœna* upon him in court for that purpose, the court out of which the record issues will grant an attachment against him.

THIS was an application for an attachment against *Johnson* the attorney for the defendant in this cause, for a contempt, in refusing to give evidence, upon being served with a *subpœna* ticket in court at the trial. *Johnson* was a subscribing witness to an agreement, under which the ejectment was brought; and in consequence of his refusal to give evidence of his attestation, &c. the plaintiff was nonsuited. The reason he assigned was, that being the defendant's attorney, he

was not bound to give evidence to the prejudice of his client. On ſhewing cauſe againſt the attachment, an affidavit on the part of *Johnſon* was read, ſtating, that ſeven tickets had before been annexed to this *ſubpœna*, whereas there ought to be only four perſons' names to one *ſubpœna*, and that no oath was tendered to him.

Mr. *Morgan* and Mr. *Lade* ſhewed cauſe. Mr. *Dunning* in ſupport of the rule.

Lord MANSFIELD.—I think the attorney's original miſbehaviour is aggravated by his preſent defence. By atteſting an inſtrument, a man pledges himſelf to give evidence of it, whenever he is called upon. Here, the attorney was preſent in court, and refuſes from corrupt motives avowed by himſelf. That he was attorney to the other ſide, is no reaſon for breaking his engagement with the plaintiff. An attorney has no privilege to refuſe to give evidence of collateral facts. I have known an attorney obliged to prove his client's having ſworn and ſigned the anſwer upon which he was indicted for perjury. I think Mr. Serjeant *Sayer*, who tried the cauſe, would have been warranted in committing this man; but he has taken the more prudent method of leaving the matter to this court. As to any irregularity in the *ſubpœna*, none appears upon the affidavit: therefore, let the rule be made abſolute.

N. B. Johnſon then undertook to pay all the coſts of the nonſuit, and of the application. Upon which the court ordered, that on payment of them, the rule ſhould be diſcharged, otherwiſe, the attachment to iſſue.

THE END OF TRINITY TERM.

A
TABLE
OF THE
PRINCIPAL MATTERS.

A.

ABATEMENT.

1. IF the court has not a general jurisdiction of the subject matter, the defendant must plead to the jurisdiction, and cannot take advantage of it on the general issue. *Mostyn* v. *Fabrigas*. *Page* 172
2. In every plea to the jurisdiction, another jurisdiction must be stated. *Ibid.* *Ibid.*

ACCEPTANCE. ACCEPTOR.

1. If the drawee of a bill of exchange, says, "he *cannot* accept it, *till stores* "*are paid for*," it is an undertaking to accept *when* the stores *are* paid for. *Pierson* versus *Dunlop*. 571. 4, 5
2. It is a rule amongst merchants, that a *mere* engagement to the *drawer* of a bill, is *no* engagement to the *holder* of it; and therefore, not *of itself* an acceptance. *Ibid.* 572, 3
3. But if such engagement be accompanied with such circumstances, as may induce a third person to take the bill by indorsement, it may amount to an acceptance. *Ibid.* 574
4. There may be a *conditional* as well as an absolute acceptance. *Ibid.* *Ibid.*

Vide BILL of EXCHANGE, No. 1.

ACCEPTANCE of RENT.

Vide COVENANT, No. 7. RENT, No. 3, 4. LEASE, No. 1.

ACCOMPLICE.

1. In cases not within the statutes, an accomplice fully and fairly disclosing the guilt of himself and companions, and admitted a witness, and giving evidence, ought not to be prosecuted for that offence, nor *perhaps* for any other of the same kind *accidentally* omitted by him. By all the Judges in Mrs. *Rudd's* case at the *Old-Bailey*, *Sept.* 1775. *Page* 339
2. But if prosecuted, he cannot plead this in bar, or avail himself of it on his trial; but may apply to the court to put off the trial, that he may apply for a pardon. *Ibid.*

Vide BAIL, No. 4, 5. PARDON, No. 1, 2.

ACT *of Bankruptcy*.

Vide BANKRUPT, No. 6. 11. 17. 18.

ACTION.

1. For *money had and received* does not lie against an excise officer to recover back an *over payment*. *Whitbread* v. *Brookshank*. . . . 69
2. If an action be brought against a *Judge of record* for an act done in his judicial capacity, he may *plead* that he did it as Judge of record, and *that* will be a sufficient *justification*: and so may a *Judge* of a court in a *foreign country* under the dominion of the crown. *Mostyn* v. *Fabrigas*. 172.

3. *All*

3. *All* actions of a *transitory* nature, that arise *abroad*, may be laid as happening in an *English county*. *Ibid.* Page 177

4. Action for *money had and received*, lies by the *true owner* of *money* or *notes*, against a *third* person, into whose hands they have come *malâ fide*; provided their *identity* can be traced and *ascertained*. *Clarke* v. *Shee et al.* 197. 200

5. Action lies for goods sold *abroad*, which are *prohibited* here, if the *delivery* of them be *complete abroad*; though the vendor may know, they are to be run into *England*. *Holman & al.* v. *Johnson.* 341

6. *Secus*, if the *vendor* were to *deliver* the goods *in England*; or if they were only to be paid for, *in case* the vendee should succeed in landing them. *Ibid.* 344, 5

7. *Actio personalis moritur cum personâ*, is a maxim not *generally*, much less *universally* true. *Hambly* v. *Trott.* 371

*8. Distinction between *penal* actions and *criminal* actions. *Atcheson* v. *Everitt.* 391

9. An action does not lie against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express directions, not to let him go under a larger sum named.—*Secus*, if the owner had directed the auctioneer to *set* the horse *up* at such a particular price and not lower. *Bexwell* v. *Christie.* 395

10. Action for *money had and received* does not lie to recover back money paid for the *release* of cattle distrained *damage feasant*, though the *distress* were *wrongful*. *Lindon* v. *Hooper.* 414

11. But, in case of goods taken in *execution* and sold under a warrant of distress; under a *conviction*; if the conviction is *quashed*, the owner may wave *the tort*, and bring an action for money had and received. *Feltham* v. *Terry*, cited in *Ibid.* 419.

12. So, where goods are taken in execution which are not the property of the persons against whom execution is taken out; the owner may *wave the trespass*, and bring his action for the amount of the money which the goods sold for. *Ibid.* *Ibid.*

13. Where an action is brought in consequence of a right liquidated by means of a statute, the statute is the only ground of action. *Rann* v. *Green.* Page 476

14. An action *on the case*, is the proper remedy for a *fraud* upon the *toll* of a market. *Blakey* v. *Dinsdale.* 664, 5

15. Does *not* lie against the *Post-master general*, for the value of a bank-note stolen by one of the *sorters* of the post-office, out of a letter delivered into the office. *Whitfield* v. *Lord Le Despencer.* 754

Vide Assumpsit.

ADJUDICATION.

1. Upon an act of parliament giving a special authority to sessions for the compulsive disposal of property, the adjudication of the sessions must follow precisely the provisions of the act. *Rex* v. *Croke.* 30

ADMINISTRATION and ADMINISTRATOR.

A *creditor*, as well as the *next of kin*, has a right to sue upon an administration bond, in the name of the Archbishop, or ordinary. *Archbishop of Canterbury* v. *House.* 140

Vide Executor.

AFFIDAVIT.

It is not a sufficient objection to an affidavit, that the party who makes it was convicted of perjury, unless such conviction was followed by a judgment. *Lee* v. *Gansel.* 3

Vide Bail, No. 6. Trover, No. 4.

AGENT.

1. Concerning the duty of an agent in insuring, and what is or is not negligence in him. *Moore* v. *Mourgue.* 479

2. If money be mispaid to an agent, and he has paid it over, he is not liable in an action by the person who mispaid it. *Buller* v. *Harrison.* 566

3. But if before he has paid the money to his principal, the person corrects the mistake, the agent cannot afterwards pay it over without making himself liable. *Ibid.* *Ibid.*

4. And

4. And if there was no new credit, no acceptance of new bills, no fresh goods bought, or money advanced for his principal, the merely passing it in account is not a payment over. *Ibid.* *Page* 568

Vide ASSUMPSIT, No. 10, 11, 12 OWNERS and MASTER, No. 1, 2, 3.

AGREEMENT.

A. by agreement in writing *unstamped*, articles with *B.* to grant him a lease for 21 years. *B.* has possession 18 years, without any lease being demanded or tendered. This agreement is a good defence to an ejectment brought by *A.* *Weakly ex dim. Yea* v. *Bucknell.* 473

AMENDMENT.

1. Replication amended after verdict by inserting the words "and the defendant does so likewise" at the end of the replication instead of "&c." *Sayer* v. *Pocock.* 407
2. Trespass and false imprisonment against *two*; *one* only found guilty; writ of error in the name of both: The court amended it by striking out the name of the defendant, for whom a verdict was given below. *Verelst* and *Smith* v. *Rafael.* 425
3. After judgment in ejectment in *Ireland affirmed* in the court of *King's Bench* in *England*, the declaration was *amended* by *enlarging the term*, though the record had been *remitted* to the *King's Bench* in *Ireland*. The court issued a writ of *supersedeas* to the former *mittimus*, and also a new writ of *mittimus* enclosing the tenor of the record so amended. The whole at the expence of the party applying. *Vicars* v. *Haydon.* 841. 844

ANNUITY.

A bond for the payment of an annuity for *a term of years* is within the stat. 7 *G.* 1. *c.* 31; though not given by the bankrupt for goods sold, &c. in the course of his trade. *Pattison* v. *Bankes.* 540

Vide USURY, No. 5.

APPORTIONMENT.

Vide INSURANCE.

APPROVER.

The doctrine and mode of approvement. *Rex* v. *Rudd.* *Page* 335

ARREST.

1. A bailiff in execution of *mesne process* may *break open* the door of a *lodger's apartment*, having first gained peaceable entrance at the outer door of the house. *Lee* v. *Gansel.* 1
2. Whether the court will discharge a person illegally arrested, is matter of *discretion*, and seems to depend on the behaviour of the party applying. *Ibid.* 9
3. An arrest must be by *authority* of the bailiff, but he need not be the *hand* that arrests, nor *in sight*, nor *within* any *precise distance* of the defendant; but he must be employed *upon that* business. *Blatch* v. *Archer.* 65
4. A bankrupt came from *Holland* with *intent* to surrender on the *forty-second day*; but, hearing his time was *enlarged*, resolved *not* to surrender till the enlarged day; in the mean time he was arrested, and the court held he should not be discharged: For till *actual* surrender, the stat. 5 *Geo.* 2. meant only to protect a bankrupt, whilst he is *going* to make such surrender. *Kenyon* v. *Solomon.* 156

Vide EVIDENCE, No. 3, 4, 5.

ARREST *of judgment.*

Vide JUGDMENT, No. 3, 4.

ASSAULT.

Vide DECLARATION, No. 3.

ASSETS.

Vide ASSUMPSIT, No. 4, 5. EXECUTOR, No. 2, 3, 4.

ASSIGNEES *of Bankrupts.*

1. In *assumpsit* against the vendee of goods sold by the bankrupt *after* the commission, they need not name themselves assignees in the declaration. *Secus*, if on a contract made by a bank-

a bankrupt *before* the commission. *Evans et al.* v. *Mann.* *Page* 569

2. And if there was an actual treaty between them and the defendant, relative to the matter in litigation, it seems they need not prove the trading, bankruptcy, &c.; for the action is founded on an actual contract, and they may recover *suo jure*. *Ibid.* 570

Vide Bankrupt, No. 12. Partners, No. 1. 3.

ASSUMPSIT.

1. A promise by the defendant himself to pay debt and costs awarded by a judgment, is no ground on which to raise an *assumpsit*, for it is turning a *judgment debt* into a *simple contract* debt. *Aliter*, if such undertaking had been by a *third* person, in consequence of such forbearance. *Anonymous.* 128

2. A *parol* promise by *A.* to pay for goods sold to *B.*, *if* B. *did not pay for them*, though made *before delivery* of the goods, is a *collateral* undertaking within the *statute of frauds*. *Jones* v. *Cooper.* 227

3. *Secus*, if the defendant had said, "deliver the goods and I will *see* "*them paid for.*" *Ibid.* 228, 9

4. *Assumpsit* lies upon a promise by an executor, to pay a legacy in *consideration* of *assets*. *Atkins & Uxor* v. *Hill.* 284

5. Also S. P. determined in *Hawkes & Uxor* v. *Saunders.* 289

6. Where a man is under a *legal* or *equitable obligation* to pay, the law *implies* a promise. *A fortiori*, a legal or equitable *duty* is a sufficient consideration for an actual promise. *Ibid.* 290

7. So any *moral* obligation to pay is a sufficient consideration. *Ibid.* 294

8. If a rector give *A. B.* a certificate to the bishop, and thereby appoint him curate of his church, promising to allow him a salary of so much, and to continue him in the office till otherwise provided of some ecclesiastical preferment, unless lawfully removed, for any fault; the curate, though discharged by the rector, may maintain *assumpsit* for his salary, not having been provided with any ecclesiastical preferment, or lawfully removed for any fault. *Martyn* v. *Hind.* *Page* 437

9. *A.* in consideration of 1 *l.* 10 *s.* 7 *d.* received of *B.* undertakes in writing to be answerable for the due payment of *G. H.*'s note to the order of the said *B.* payable in five months. Afterwards, and before the note was due, *A.* became a bankrupt. *H.* did not pay the note when it became due. It was held that *A.*'s undertaking was *collateral* only; and therefore it rested in *contingency* at the time of *A.*'s commission. Consequently it could not be proved under it. *Ex parte Adney.* 460

10. If money be paid by mistake to an agent, and placed by him to the account of his principal, but *not paid over*, *assumpsit* for money had, &c. to the use of the person who has paid it, will lie against the agent. The mere *passing such money in account*, or *making rest*, without new credit given, fresh bills accepted, or further sum advanced for the principal in consequence of it, is not equivalent to a payment over. *Buller* v. *Harrison.* 565

11. *Assumpsit* lies against the *owners* of a ship for *necessaries* furnished for it by *order* of the *master*, though the master be *lessee* of the ship, for a term of years; under covenants, that he shall have the *sole management*, and employ her for his own *sole benefit*, &c. and that he shall repair her at his own sole *cost*; and though such necessaries were furnished without the knowledge of the owners, or without their being known to the person who supplied them. *Rich* v. *Coe.* 636

12. But if the person supplying such necessaries (No. 11) had *notice* of the contract between the owners and master, there might be ground to say, he meant to absolve the owners. *Ibid.* 639

13. *Assumpsit* for *money had and received* will not lie to recover back *winnings* paid by the *lottery-office-keeper* or *insurer* of lottery tickets, to the *insured*, in consequence of having insured his tickets, contrary to the statute. *Browning* v. *Morris.* 790

14. But such action (No. 13.) will lie to recover the premiums of insurance paid

paid by the *insured* to the lottery-office-keeper. *Browning* v. *Morris*. *P.* 791
15. *Assumpsit* for money had and received will not lie to recover an *exorbitant* demand. *Jestons* v. *Brocke*. 793
16. S. P. decided in *Plumbe* v. *Carter*, cited *Ibidem*. See also 116
17. In an action for *money had and received*, neither party is allowed to entrap the other in *form*. *Stevenson* v. *Mortimer*. 807
18. An action for *money had and received* is *not* a *proper* action to try a *warranty*. *Power* v. *Wells*. 818
Vide Action, No. 1, 4, 5, 6. 9, 10, 11, 12. Agent, No. 2, 3. Bankrupt, No. 16. Owners and Master, No. 1, 2, 3.

ASSURANCE. ASSURED. ASSURER.

Vide Insurance.

ATTACHMENT.

1. One in custody upon an attachment for non-payment of costs under stat. 5 & 6 *Wil.* & *Mar. c.* 11. § 13. may be discharged under the lords' act. 32 *Geo.* 2. *c.* 28. § 13. *Rex* v. *Stokes*. 136
2. An *attachment* for non-payment of costs, is in the nature of an *execution* in a *civil* suit. *Ibid.* 137
Vide Attorney, No. 3. Award. Corporation, No. 6.

ATTORNEY.

If an attorney be *convicted* of *felony*, the court will *strike him off the roll*, though he has been burnt in the hand, and suffered imprisonment, pursuant to his sentence. Because he is an unfit person to practise as an attorney. *Ex parte Brounsall*. 829
2. An attorney is not *privileged* from giving evidence of *collateral* facts. *Doe* v. *Andrews*. 846
3. Therefore, where the defendant's attorney, who was a witness to an agreement upon which the plaintiff brought his ejectment, refused to give evidence of his attestation, &c. upon being served in court with a *subpœna* for that purpose, the court of *B. R.* out of which the record issued, granted an attachment against him. *Doe* v. *Andrews*. *Page* 846
4. He may be obliged to prove his *client's* having *sworn* and *signed* an *answer*, upon which the latter is *indicted* for *perjury*. *Ibid.* *Ibid.*
Vide Partners, No. 5. Warrant of Attorney.

AVERMENT.

Vide Libel, No. 1. 5. Pleading, No. 2.

AUTHORITY.

1. Where, by a statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and must appear to be so upon the face of their proceedings. *Rex* v. *Croke*. 26
Vide Notice, No. 1, 2.

AWARD.

1. A motion to set aside an award, must be made before the *last* day of the next term after such award is published. Otherwise it is too late, and an *attachment* for non-performance of it may issue. *Freame* v. *Pinneger*. 23

B.

BAIL.

1. WHERE the plaintiff might have had judgment against the original defendant, bail below are liable for the whole *debt* and costs. *Orton* v. *Vincent*. 71
2. A defendant who has been superseded for want of being charged in execution within two terms after judgment, *cannot* be held to *special bail* in an action brought upon such judgment; but he may be *charged in execution*, after judgment obtained in the *second* action. *Blandford* v. *Foote*. 72
3. A defendant, who has had judgment against him in an action for less than 10 *l.* cannot be held to *special bail* in a fresh action, either upon the judgment, or on a promise to pay the debt

debt and costs amounting to more than that sum. *Anonymous.* *Page* 128

4. An accomplice, who, in a case not within the statutes, is, under the practice allowed, admitted by the justices of peace as a witness, and is afterwards prosecuted, has only a claim to the mercy of the crown, founded on an express or implied promise of the magistrate, on a condition to be performed: And it depends on his conduct in fully and fairly disclosing the joint guilt of himself and his companions, whether the court will admit him to bail, that he may apply for a pardon. *Rex* v. *Rudd.* 331

5. Wherever an accomplice has a right to a pardon (which he may have, 1. by approvement; 2. by virtue of the statutes of 10 & 11 *Will.* 3. and stat. 5 *Ann. c.* 4.—and 3. by royal proclamation) the court will bail him that he may apply for it. So also they will, if he has only an *equitable* claim to a *recommendation* for mercy, gained by being admitted evidence for the crown under the *practice allowed.* 334

6. An affidavit in trover "that the defendants have possessed themselves of divers goods belonging to the plaintiff, and have refused to deliver them up; and that *they or some of them* have converted them, &c." is sufficient to hold them to special bail. *Charter* v. *Jacques.* 529

7. If by the defendant's neglect the bail-bond becomes forfeited, the notice (to stay proceedings on the bail-bond) should be, that he will put in, and *perfect* bail on such a day. And in that case, the plaintiff may oppose the bail in court, without its being a *waver* of the bail-bond. *Boldero* v. *Gray.* 769

8. It is a ground for rejecting a person as bail, that he is clerk to the defendant's attorney. *Bologne* v. *Vautrin.* 828.

Vide BANKRUPT, No. 30.

BANKRUPT.

1. A certificate discharges a bankrupt from a debt accruing *before* the commission, tho' judgment be not obtained till *after* the *certificate* allowed. *Bouteflower* v. *Coates.* 25

2. An *uncertificated* bankrupt may be a witness to *diminish*, but not to *increase* the fund: Therefore, in an action between a man unconnected with him (who was plaintiff) and a creditor of his (who was defendant) the bankrupt may be admitted to prove that the goods in question were delivered to *his* use and upon his credit only, and not to the use, or upon the credit of the defendant. *Butler* v. *Cooke.* *Page* 70

3. So in an action by assignees for money due to the bankrupt's estate, the bankrupt may be a witness for the defendant; but not for the assignees, unless he give a release, and has got his certificate. *Langden et al.* v. *Walker*, cited *Ibid.*

4. A trader, in contemplation of absconding, incloses certain bills to *F.* a particular creditor, saying, he has the honour to shew him that preference, which he conceives is his due. This is done without the privity of *F.* and followed by an act of bankruptcy, before the notes could be delivered. The *essential motive* being to give a *preference*, and the act *incomplete*, it is *void*, though in favour of a very meritorious creditor. *Harman* v. *Fisher.* 117

5. But a payment made by a trader *in the ordinary course of dealing*, or *enforced* by legal process, though but the evening before his bankruptcy, is good. *Ibid.* 123

6. Though the act be complete, yet if the *sole* motive was to give a preference, it shall be void; and, if by *deed*, is in itself an act of bankruptcy. *Linton* v. *Bartlet.* *Ibid.* 124

7. But if the preference were only consequential, the case might be different: As if a payment were made, or an act done, in pursuance of a prior agreement. *Ibid.* 125

8. Though the judgment on which a bankrupt is in custody, be subsequent to the commission sued out, yet, if *the cause of action* arose before the bankruptcy, the bankrupt may be discharged by statute 12 *Geo.* 3. *c.* 47. *s.* 2. and interest and costs accrued since, are likewise discharged. *Blandford et al.* v. *Foote.* 138

9. The

9. The *enacting* part of *sect.* 11. stat. 21 *Jac.* 1. *c.* 19. is *not restrained* by the *preamble*, but extends to goods of a third person, which he has permitted the bankrupt to be in *possession of*, and to *sell as his own*, as well as to the bankrupt's *original property*, kept and disposed of by him as his own, after having conveyed it to a third person. *Mace* v. *Cadell*. *Page* 232

10. One who has traded *to England*, whether native, denizen, or alien, though never a resident trader in *England*, but coming over here occasionally, and committing an act of bankruptcy, is an object of the bankrupt laws. *Alexander* v. *Vaughan*. 398

11. A fraudulent judgment and execution, though void against creditors, is not in itself an act of bankruptcy. *Clavey et al.* v. *Hayley*. 427

12. One of three partners in a ship and cargo, the out-fit of which was 4,658 *l.* pays only 410 *l.* in part of his third share and gives his notes for the remainder; but, before they become due, is a bankrupt. The other partners cannot, by voluntarily discharging the notes, stand in his place for the share of the profits. But the assignees are entitled to a *full third*, both of the profits, and of the value of the ship. *Smith* assignees of *Hague* v. *De Silva*. 469

13. A surety of a bond who pays the debt *after* the bankruptcy of his principal, is not barred by the certificate; though the bond was forfeited *before* the bankruptcy. *Taylor* v. *Mills*. 525

14. A bond for an annuity for a term of years is within the stat. 7 *Geo.* 1. *c.* 31; and may therefore be proved under the commission, as a debt payable at a future day; though not given in the course of trade. *Pattison* v. *Bankes*. 540

15. Stat. 7 *Geo.* 1. (above cited) extends to all *personal* securities for a valuable consideration, where the time of payment is *certain*, though *future*. *Ibid.* 543

16. A bankrupt may, in consideration of a debt due *before* the bankruptcy, and for which the creditor agrees to accept no dividend, make such creditor a satisfaction for the whole or in part, by a new undertaking; and *assumpsit* will lie upon such undertaking. *Trueman* v. *Fenton*. *Page* 544

17. A *pretended sale* to a creditor though of part only of a trader's goods, if *not in the course of trade*, but merely calculated to give a *fraudulent preference* and to defeat the equality of the bankrupt laws, is void; though the delivery of the goods to the creditor, and his assent to the transaction be compleat before the act of bankruptcy. But such sale is not in itself an act of bankruptcy, not being by deed. *Rust* v. *Cooper*. 629

18. No fraudulent transaction which is not a deed, is in itself an act of bankruptcy. *Ibid.* 633

19. But if a creditor be paid *in the course of business*, it is good, notwithstanding the debtor's knowledge of his own affairs, or his intention to break: Because such preference is got *consequentially*, *not* by *design*. *Ibid.* 634

20. So, where a creditor presses for payment, and the debtor makes a mortgage of goods, and delivers possession. *Ibid.* *Ibid.*

21. A bond payable by installments, given in consideration that the obligee would marry and settle a small estate upon a servant maid, and also maintain a bastard of the obligor, is within the stat. 7 *Geo.* 1. *c.* 31. and may be proved under a commission of bankrupt against the obligor. *Ex parte Cottrell*. 742

22. Merely *drawing* bills upon a person's *own account*, at the expence of paying a *quarter per cent. commission*, besides interest at 5 *l. per cent.* for their being discounted, and borrowing *accommodation* notes in lieu of his own to the same amount, will not make a man an *object* of the *bankrupt laws*. *Hankey* v. *Jones*. 745

23. Drawing and re-drawing may or may not amount to a trading in merchandize. It depends upon circumstances. *Ibid.* 751

24. If a person in the country draw on his banker in *London*, for the purpose of discharging a particular debt; and direct his banker to re-draw upon him to the same amount; that alone is not a trading in merchandize. *Ibid.* *Ibid.*

25. But where two persons who have large sums of other people's money in their hands, are in a course of drawing and re-drawing upon each other for the amount of such sums, *that* is a trafficking in exchange. *Hankey* v. *Jones*. *Page* 751
26. As where *A*. and *B*. the one a military agent in *England*, and the other in *Ireland*, drew on each other for the amount of 280,000 *l*. and upwards, though neither took commission money, yet each had a visible profit from the exchange; therefore *such drawing* and *re-drawing* was held to be a *trafficking in exchange*. *Ibid*. 751
27. Whether a man is a trader within the several statutes against bankrupts, is a question of *law*, not of *fact*. *Ibid*. 752
28. A *second* commission taken out, *pending a former*, under which a bankrupt has *not* obtained his *certificate*, is *void*. *Martin* v. *O'Hara*. 823
29. All the effects of the bankrupt taken under such *second* commission (No. 28.) belong to the creditors under the *first*. *Ibid*. *Ibid*.
30. When a bankrupt is clearly entitled to his discharge, he needs not be surrendered by his bail. The court will, in the first instance, order an *exoneretur* to be entered on the bail-piece. *Ibid*. 824
Vide ARREST, No. 4. BOND. PARTNERS, No. 1, 2, 3, 4.

BARR.

Vide PLEADING, No. 6.

BARRATRY.

1. Barratry is every species of fraud in the master or mariners of a ship, by which the owners or freighters are injured; and a deviation, if owing to such fraud, is barratry. Therefore, in such circumstances, the underwriters who have insured against barratry, are liable, whether the loss happened during such fraudulent voyage, or after. *Vallejo* v. *Wheeler*. 143
2. *Secus*, if the deviation be with the privity or consent of the owners. *Ibid*. *Ibid*.

BARON and FEME.

1. Re-delivery by *féme*, after death of *baron*, of a deed executed by her whilst under coverture, is *equivalent* to a *new* grant, and binds her, without being re-executed or re-attested; and circumstances alone may amount to such re-delivery, though the original deed were a joint deed by *baron* and *féme*, affecting her land, and no fine levied. *Goodright* v. *Straphan*. *Page* 201
Vide MARRIAGE, No. 1.

BILL *of Exceptions*.

1. The court out of which a record issues, cannot take cognizance of a bill of exceptions tendered at the trial of the cause. *Symmers* v. *Regem*. 501
2. But if a special verdict be found in the same cause, (No. 1.) upon which the court below pronounces judgment; if that judgment be right, though they likewise proceed to hear and determine upon the bill of exceptions, that alone is not a ground for a court of error to reverse the judgment. *Ibid*. 502—4

BILL *of Exchange*.

1. If the *indorsee* of a bill of exchange, who has received a *navy bill assigned* to the *drawee*, as a security to him (the indorsee) till the bill of exchange is excepted, deposit such navy bill with the drawee, and the drawee receive the money upon it, he (the drawee) is answerable for the amount in an *action for money had and received*, though he may have done nothing that amounts to an acceptance of the bill of exchange. *Pierson* v. *Dunlop*. 571
Vide ACCEPTANCE, No. 1, 2, 3.

BILL *of Middlesex*.

1. By the general rule and course of the *King's Bench*, the bill filed is the commencement of the suit. *Foster* v. *Bonner*. 454
2. *Peers* may be sued by bill. *Gosling* v. Lord *Weymouth*. 844
Vide VERDICT, No. 2.

BOND.

It is a good consideration for a bond, that the obligee will marry and settle a small estate on a servant maid, and maintain a bastard which the obligor had by her; and if the obligor become bankrupt, the bond may be proved under his commission. *Ex parte Cottrell.* Page 742

Vide BANKRUPT, No. 13, 14. 21. INSOLVENT DEBTOR, No. 2.

BOUNTY.

The price of barley at the port where it is exported, is the rule by which to regulate the bounty on the exportation of *strong-beer*; and not the average price of barley throughout the kingdom. *Whitbread* v. *Brooksbank.* 66

BY-LAW.

1. A by-law by the mayor and common council of *Exeter*, that no butcher or other person should, within the walls of the said city, slaughter any beast under pain to forfeit certain penalties therein specified, is good, being not a *restraint* of trade, but only a regulation of it: And other inhabitants are bound as well as the members of the corporation. *Pierce* v. *Bartram.* 270

C.

CANCELLING.

VIDE REVOCATION, No. 1. WILL, No. 1, 2.

CASE.

Vide ACTION, No. 14. ASSUMPSIT. CORPORATION, No. 4.

CERTAINTY.

1. There are *three* kinds of *certainties*. 1. *Certainty* to a *certain intent in general*. 2. *Certainty* to a *common intent*. 3. *Certainty* to a *certain intent* in *every particular*. *Rex* v. *Horne.* Page 682
2. The *last* is *rejected* in all cases, as partaking of too much *subtlety*: The *second* is sufficient in *defence*: And the *first* is required in a *charge* or accusation. *Ibid.* *Ibid.*

CERTIFICATE.

1. A certificate by a rector to the bishop, appointing *A. B.* curate of his church, promising to allow him a salary, and to continue him in the office till preferred or removed, &c. is no *contract* with the bishop, but merely *information* to him of a matter of fact. The contract is with the *curate*. *Martyn* v. *Hind.* 443
2. If the bishop ordain such curate on the above title, it is a *licence* within the intent and meaning of the canon law. *Ibid.* *Ibid.*

Vide BANKRUPT, No. 1, 2.

CERTIORARI.

1. No *certiorari* lies on stat. 30 *Geo.* 2. c 24. *Rex* v. *Smith.* 24
2. It lies *on the part of the prosecution* to remove an indictment on stat. 13 *Geo.* 3. *c.* 78. *sect.* 24. for a nuisance in a highway, before traverse or judgment thereupon. *Rex* v. Inhabitants of *Bodenham.* 78
3. It does not lie to remove an indictment for *felony* from *Hicks's Hall*, without the consent of the prosecutor. *Rex* v. *Duchess of Kingston.* 283
4. It lies to remove a *presentment* in a court leet. *Rex* v. *Roupell.* 458

CHARTER.

Where the words of a charter are doubtful, the usage under it is of great force, in explaining the meaning. *Rex* v. *Varlo.* 250

Vide PRESUMPTION, No. 1, 2. LIMITATION, No. 2.

CODICIL.

Vide WILL, No. 6.

COLLEGE.

1. Independent members are mere boarders, and have no corporate rights, nor can appeal to the visitor *Rex* v. *Grundon & al.* Page 319
2. If a college do not exceed their jurisdiction, the King's courts have no cognizance; and expulsion is a matter entirely of their own jurisdiction. *Ibid.* 322

Vide Evidence, No. 6. Visitor, No. 1, 2.

CONSTABLE.

1. One who is a *resiant* within a private leet, within a hundred, is not therefore *exempt* from serving the office of constable of the hundred. *Rex* v. *Genge.* 13
2. And a custom to elect such a one constable is good. *Ibid.* *Ibid.*

CONSTRUCTION.

Vide Deed. Devise. Fraud. Power. 4. Statutes. Words.

CONTINGENCY.

An instance of a contingency, with a double aspect. *Baldwin* v. *Karver.* 314

CONTRACT.

1. A contract, though not prohibited by positive law, nor adjudged illegal by precedent, may nevertheless be void, if against principles of morality or sound policy. *Jones* v. *Randal.* 39
2. There are two sorts of prohibitions in respect of contracts; 1st, To protect weak or necessitous men from being over-reached: And here the rule, *in pari delicto potior est conditio defendentis*, does not hold. 2dly, Prohibitions founded upon reasons of public policy: there the above rule does hold. *Clarke* v. *Shee et al.* 200
   This doctrine (No. 2.) exemplified. *Browning* v. *Morris*, 792

CONVICTION.

1. Proof of having *played* at *bowls*, will not warrant a conviction (and consequent imprisonment) as an idle and disorderly person. *Rex* v. *Clarke.* Page 35
2. A conviction on stat. 6 *Geo.* 1. *c.* 48. *sect.* 1. must ascertain the *costs*, or it is *bad*. *Rex* v. *Hall.* 60
3. In a conviction, it is sufficient if enough appears, to shew that the evidence was given in the presence of the defendant, *without* expressly stating that he was *present* at the time. *Rex* v. *Kempson.* 241
4. If a justice of peace convict a person of more than *one offence* on the *same* day, by exercising his calling on a *Sunday* (contrary to stat 29 *Car.* 2. *c.* 7.), it is an *excess* of jurisdiction, for which an action will lie before the convictions are quashed. *Crepps* v. *Durden.* 640
5. What evidence is insufficient to convict a man of knowingly harbouring, *&c.* tea, *&c.* *Rex* v. *Hale.* 728, 9
6. *Quære*, if a conviction can be adjudged bad in part, and good for the rest? *Ibid.* *Ibid.*

COPIES.

Vide Evidence, No. 1. Journals.

COPYHOLD. COPYHOLDER.

1. A lease for years by a copyholder (with licence) defeats the widow of her free bench, where she would have been entitled to it, *if* her husband had died *seised*; though there was only one instance produced of such a lease by licence, before. *Salisbury ex dim. Cooke* v. *Hurd.* 481
2. Difference between free-bench and dower. *Ibid.* *Ibid.*
3. *Quære*, if copyholds are within the stat. 27 *Eliz.* *c.* 4.? *Doe* v. *Routledge.* 705

Vide Limitation, No. 6.

CORPORATION.

1. Under circumstances of long acquiescence, and where the objection would go to *dissolve* the corporation, the court might not be inclined to disturb it, though within twenty years. *Rex* v. *Carter.* 59

2. A

2. A *corporation* seised of lands in fee for their own profit, are to be considered as *inhabitants* and *occupiers* of such lands, within the meaning of the stat. 43 *Eliz. c.* 2. and, in respect thereof, liable *in their corporate capacity* to be rated to the poor. *Rex* v. *Gardner*. *Page* 79

3. How process shall go against a corporation. *Ibid.* 85

4. Case against a corporation for not repairing a creek into which the tide of the sea *flowed* and *reflowed* (but not saying it was a *navigable river*) *as from time immemorial they had been used*: The action lies, though no special damage be stated. And, saying, "*as from time immemorial they* "*have been used*," is well enough, without alleging that they were bound, &c. *ratione tenuræ*, or other special cause. Mayor of *Lynn* v. *Turner*. 86

5. Where the power of doing corporate acts is not specially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are present do the act. *Rex* v. *Varlo*. 250

6. Proceedings in *Chancery* against a corporation for a contempt, cannot lie against the offending parties *personally*, but must be by sequestration of their effects and estate. *Rex* v. *Wyndham* 377

7. What is or is not a *disfranchisement*. *Symmers et al.* v. *Regem*. 502

8. In general it must be the act of the whole body. *Ibid.* 504

9. An order of *restoration* of a corporator *illegally* disfranchised relates to the *original* right. *Ibid.* 503

10. How far the rights of the electors can be gone into, in a trial of the rights of the elected. *Ibid.* *Ibid.*

11. It *cannot* be done by surprise and without notice, where the voter is in *possession*. *Ibid.* *Ibid.*

12. Where the *right* of election is in *freemen* in their *corporate* description; whether they were *duly chosen* or not, is not to be tried at the election of a *third* person. *Ibid.* 507

13. In a *quo warranto* against particular members, you cannot go into the title of other corporators *de facto*. *Ibid.* 508

14. The majority of mayor and aldermen for the time being, is sufficient to constitute the corporate assembly of *Portsmouth*. *Rex* v. *Monday*. *Page* 538

15. When duly met, corporate acts may be done by the majority of those who constitute the meeting. *Ibid.* *Ibid.*

16. In the election of a *member of parliament*, or a *verderor*, there is no way of defeating the election of one candidate, but by voting for another. *Secus*, in the business of corporations. *Ibid.* *Ibid.*

17. When a person is proposed as alderman, the corporation may vote against him, without voting for another. *Ibid.* 539

18. Residence is not a precedent qualification for a *burgess* of *Portsmouth*, to entitle him to be elected alderman. *Ibid.* *Ibid.*

19. Objection of not having taken the *Sacrament*, how the stat. 5 *Geo.* 1. *c.* 6. applies to it. *Ibid.* *Ibid.*

Vide also *Harrison* v. *Evans*, cited in *Acheson* v. *Everitt*.

Vide COLLEGE, No. 1, 2. BY-LAW, INFANT.

COSTS.

1. *Quære*, if an informer in a *qui tam* action shall be obliged to give *security* for costs. *Golding qui tam* v. *Barlow*. 24

2. To be paid by offenders against stat. 6 *Geo.* 1. *c.* 48. *sect.* 1. must be *ascertained* by the *conviction*. *Rex* v. *Hall*. 60

3. Costs on a rule of *reference*, are costs as between *party* and *party*, *not* as between *attorney* and *client*. *Marder* v. *Cox*. 127

4. The court will not stay proceedings till the plaintiff give security for costs, though he live in the *East Indies*. *Nuncomar* v. *Burdett*. 158

5. The court will not stay proceedings in a *qui tam* action, till costs on a *non pros.* in a former action, by a different plaintiff against the same defendant, be paid. *English qui tam* v. *Cox*. 322

6. If a *qui tam informer* on the stat. 21 *Hen.* 8. *c.* 13. for *non-residence*, is

non-suited, the defendant is entitled to *costs*. *Wilkinson qui tam* v. *Allot* Page 366

7. The stat. 18 *Eliz.* c. 5. extends to *qui tam* informers, as well as to those who sue for the whole penalty. *Ibid.* *Ibid*

8. A plaintiff on the stat 9 *Geo.* 1. c. 22. *sect.* 7. is *not* entitled to costs; because it is a statute *subsequent* to the stat. of *Gloucester*, which gives costs where *damages* were before recoverable. *Ibid.* 367

Vide Ejectment, No. 2. Covenant, No. 6.

COVENANT.

1. Where there are covenants to be performed on each side, the defendant cannot take advantage of the non-performance of the plaintiff's covenant, by way of *set-off*; unless the plaintiff's covenant was for payment of a sum of money. *Howlet* v. *Strickland.* 56

2. *Covenant*, "to permit plaintiff in "the last year of the term to sow "clover among the barley and oats, "sown by the defendant." *Breach*, "that the defendant sowed barley "and oaths, *without giving notice* "to the plaintiff." Plea, "that "the defendant *did not prevent* the "plaintiff from sowing as much clo-"ver as he thought fit;" and, upon demurrer, adjudged a *good* plea. *Hughes* v. *Richman* 125

3. When a judgment for a penalty shall stand as a security for damages by the non-performance of covenants. *Goodwin* v. *Crowle*. 357

4. You cannot go to issue on a general averment of performance. *Seyre* v. *Minns.* 578

5. In a *declaration* in covenant, so much only of the *substance* of the *deed* and the *covenant* shall be set out, as will shew the plaintiff's title. *Dundass* v. *Lord Weymouth.* 665

6. If more be inserted, the court will refer it to the master to strike it out with costs, and will animadvert upon the drawer of the declaration. *Ibid.* *Ibid.* *Vide* S. P. *Price* v. *Fletcher.* 727

7. If a lessee covenant not to *under-let* without the consent of the lessor under *hand* and *seal*, with a power of re-entry in case of a breach, *acceptance*, by the lessor, of *rent* due *after* the *condition broken*, with *full notice*, is a *waiver* of the forfeiture. *Goodright* v. *Davids.* Page 803

8. Instance, where the act of the lessor and his ancestors, by *repeatedly inserting* in different renewals of a lease for lives, a *covenant* to *renew under the same rent and covenants*, was held, to construe such covenant, tho' doubtfully worded, a covenant for a *perpetual renewal*. *Cooke* v. *Booth.* 819

Vide Judgment, No. 1. Set-Off, No. 1.

COVERTURE.

Vide Baron and Feme.

COURT.

Vide Inferior Court.

CREDITOR.

Vide Bankrupt.

CROSS REMAINDER.

Vide Remainder, No. 1, 2, 3. Devise, No. 26.

CURATE.

1. Cannot be removed *without cause* by the rector, who has appointed him by certificate to the bishop, promising to allow him a salary and to continue him in the office till otherwise provided of some ecclesiastical preferment, unless lawfully removed for any fault. *Martin* v. *Hind.* 437

2. If removed for any fault, he should have notice. *Ibid.*

3. *Quære*, If he may not be removed by the bishop? 441

Vide Assumpsit, No. 8. Certificate, No. 1. 2. Surprise.

CUSTOM.

1. "Ancient custom" (found in a special verdict) means "immemorial "custom." *Rex* v. *Genge.* 17

2. A custom for the lord of the manor, on every death or alienation, to take the second beast best, adjudged to be ill

ill set out, for want of stating the exemption of certain tenures, and which exemption was proved at the trial. *Griffin* v. *Blandford*. *Page* 62

Vide CONSTABLE, No. 2.

D.

DAMAGES.

IN *personal torts*, the court will never grant a *new trial* for *excessive* damages, unless they are such as *manifestly* shew the jury to have been actuated by *passion*, *partiality*, or *prejudice*. *Gilbert* v. *Burtenshaw*. 230

Vide COVENANT, No. 3.

DECLARATION.

1. On a declaration upon a corrupt contract made the 21st of *December* 1774, giving day of payment to the 23d of *December* 1776, and *issue* thereon; evidence of a contract on the 23d of *December* 1774, for *two* years, will not support the issue. *Carlisle qui tam* v. *Trears*. 671

2. *Declaration* that the defendant used a gun, *being an engine to kill and destroy the game*, is good, *after verdict*. *Avery* v. *Hoole*. 825

3. *Quære*, if good upon a *special demurrer*? *Ibid.*

4. Declaration that the defendant on the 6th of *May*, and on *divers other days and times between* that day and the commencement of the suit, *assaulted* the plaintiff, is bad. *Michell* v. *Neale*. 828

5. Declaration against the defendant *only*, stating that *he* and *another* made their promissory note, by which they *jointly* OR *severally* promised to pay, is good. *Rees* v. *Abbott*. 32

Vide COVENANT, No. 5, 6. EXECUTOR, No. 3, 4. LATITAT. VARIANCE, No. 1, 4, 5. VENUE, No. 1. VERDICT, No. 1.

DEEDS.

1. One by deed, in consideration of love and affection to his name, and blood, &c. and for settling *the one undivided moieties* of his manors, lands, &c. therein-after mentioned, grants the same *undivided moieties*, (particularly describing them,) *together with all other his lands, tenements, and hereditaments in the kingdom of* Ireland, *habendum* the said *undivided moieties* before granted, *together with all other his estate in the kingdom of* Ireland, to *A.* to the several *uses* therein-after *declared*, and *for no other use whatsoever*; and then declares the *uses* of the undivided *moieties only*: Held, that the grantor did not intend to pass any lands but the undivided moieties. *Moore* v. *Magrath*. *Page* 9

2. The rule of law in respect of the construction of deeds is, that they shall operate according to the intention of the parties, if by law they may: And if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention. *Goodtitle* v. *Bailey*. 600

Vide BARON and FEME. USES. RELEASE.

DEVIATION.

Vide INSURANCE, No. 1. BARRATRY, No. 1, 2.

DEVISE.

1. A devise to a *son* of which the testator supposed his wife to be *enseint*, when he should be 21 years old; but if a *daughter*, then, one *moiety* of his estate to his *wife*, and the *other moiety* to his *two* daughters (there being one at that time) at the age of twenty-one; if either of the daughters die before that time, her share to the survivor; if both die before that time, both their shares to the wife in fee; if she die, her share to the daughters. The testator died; the wife was not *enseint* at the time of the will, or at his death. The *daughter* died under age, and *without issue*. The wife shall take the *whole* estate. *Statham* v. *Bell*. 40

2. One devises certain lands to trustees, *in case his personal estate shall not be sufficient for the payment of debts*, &c. in

in aid of it; and "*all the rest, residue* "*and remainder* of his *real* and *per*-"*sonal* estate to his *wife*." The personal estate proved sufficient.—The *lands* devised in aid, pass to the *wife* by the residuary clause.—So, if the personal estate had proved deficient *in part only*, the wife would have been entitled to the remainder. *Goodtitle* v. *Knot*. *Page* 43

3. A devise of land in *England* is considered in a different light from a *Roman* will; the *latter* being considered as an *institution* of the *heir*; the *former*, as a *conveyance* by way of *appointment*. *Harwood* v. *Goodright*. 90

4. One, possessed of *three* species of estates in the county of *H.* *viz.* one by articles *wholly executory*, another *executory* in *part*, and a third (being an *advowson*) completely *executed* by a recent conveyance, devises to his wife as follows. "All the manors, "messuages, *advowsons*, and hereditaments in the county of *H.* for "the *purchase* whereof I have already "*contracted* and *agreed*, or, *in lieu* "*thereof*, the money arising by the "sale of my real estate in the county "of *L.*" (with directions for completing the contracts.) The *advowson*, the purchase of which was completely *executed* before the making of the will, shall pass to the wife. *St. John* v. *The Bishop of Winton*. 94

5. Devise to *T. G.* *for and during his natural life*, and after his decease to *his heirs* and assigns for ever, and, *for want of such heirs*, to *T. E.* his heirs and assigns for ever. *T. G.* has only an *estate tail*. *Morgan & Uxor* v. *Griffith*. 234

6. To make a devise of lands *without* any *limitation*, a *fee*, such a manifest intention must appear, that the testator *meant* to give a fee, as may satisfy the *conscience* of the court, in pronouncing it such. If it is barely problematical, the rule of law must take place. *Roe* v. *Blackett*. 235

7. A devise to the testator's eldest son of 200*l.* also to his three younger sons *G.*, *W.* and *G.* and their *heirs*, a house and close as *tenants in common*, *when they come at age of* 21 *years*; also, to his *wife* a house, and after her decease the same to go to his three daughters and their heirs for ever. And his will further was, that *if* ANY *of his above-named children* should happen to die *before they came of age*, and without issue, then *their* property and share in *any* of the above bequeathed premises to be *equally* divided *amongst the* REST *of his surviving children*, share and share alike. The *eldest* son was of *age* at the date of the will; two of the *younger* sons died *under age*, &c. *Per cur.* —The *eldest* son and the *three daughters* are equally entitled with the *younger* son, to the shares of the deceased brothers. *Denn* v. *Balderston*. *Page* 257

8. One, seised of the lands of *C.* and *G.* in *fee*, of other lands in *B.* and *B.* for *lives renewable for ever*, and of other lands under leases for *three lives*, with *reversionary* terms for twenty-one years from the death of the *surviving* life in each; and being himself the surviving life in one, devises thus: *and as to all my worldly substance*, I give to my *mother*, my house and land of *G.* with the appurtenances, *during her natural life*, clear of any deduction; and also my lands of *C.* (subject to a rent payable thereout) *for life*, *without liberty of committing waste thereon*; and after several legacies to relations, (one of which was the heir at law,) he devises to his *mother*, *all the* REMAINDER *and* RESIDUE *of all his* EFFECTS *both* REAL *and* PERSONAL, which he shall die possessed of. The *mother*, by this residuary clause, takes a *fee* in all the testator's fee-simple estates, and the whole of his interest in the rest of his real property; subject to the charges thereon. *Hogan* v. *Jackson*. 299

9. Distinction between the *Roman* law concerning wills, and our law of devises. *Ibid.* 305

10. Words of *perpetuity* in a devise, are *tantamount* to words of *limitation*. *Ibid.* 306

11. The distinction between words that denote only a *description of the specific estate*, and words that denote the *quantum of interest that the testator has in it*. *Ibid.* *Ibid.*

12. Effect

12. Effect of introductory words in a will, what. *Hogan* v. *Jackson.* See No. 21, 22, 23.

13. *Real effects* mean real property. *Ibid.* *Ibid.*

14. An objection that the testator first gave his mother only an *estate for life,* and made it *liable to impeachment of waste,* is not sufficiently strong to controul the operation of subsequent words in a residuary clause, manifestly importing an intention to give a fee. *Ibid.* 308

15. Devise to trustees in trust for the use of the *heirs male* of *J. A.*: and in *default of such issue,* to the use of the *heirs male* of *R. A.*: and *in default of such issue male,* to the use of *all* and *every* the *grand-children* of *J. A.* and *S. M.* as *tenants in common.* A codicil (bearing the same date as the will) directs trustees to pay the interest and produce of his real and personal estate to the testator's wife *S. A.* and to the said *J. A.* and *R. A.* during their lives, with survivorship. *Eight* grand-children of *J. A.* and *S M.* were alive at the date of the will; a *ninth* was born *before* the testator died; *twelve* more were born *after* his decease; and *all* in the life-time of *R. A.*, who, as well as the devisee *J. A*, died without issue. Held, that as the 21 grand-children were *all* alive *at the death of* R. *A.*, *all* were *equally* entitled. *Baldwin* v. *Karver.* 309

16. *Distinction* between an *immediate* devise to *children,* and a *provision* for them in *marriage settlements,* or a devise *limited* to them by way of *remainder,* or upon a *contingency* uncertain in event: The *first* only relates to children *in esse at the time*; the *second* is intended equally for *all* the children of the *marrige*; the *last* extends to *all* that are *in esse at the time* when the devise *vests.* *Ibid.* 314

17. One devises thus: "*As touching* "*my worldly estate,* I devise the same "as follows: I give to my wife *E. M.* "5 *l.* to be paid yearly out of my "estate at G.—*Item,* to my son *T. M.* "and daughter *E.* 5 *l.* each, to be paid "twelve months after my decease. "– *Item,* to my sons *I. M.* and *R.* "*M.* whom I make my——and "ordain my *sole executors, all my lands* "*and tenements freely to be enjoyed and* "*possessed* ALIKE."—*I. M.* and *R. M.* are *tenants in common,* and take a *fee.* *Loveacres* v. *Blight.* Page 352

18. One devises ALL *his estate,* &c. in the counties of *Gloucester* and *Worcester* and *elsewhere in the kingdom of England* to trustees, *subject* to certain *charges* thereon, and limitations in his *marriage settlement named*; in *trust,* to stand seised of the said estates in *Gloucester* and *Worcester* or *elsewhere,* to certain uses. His estates in *G.* and *W.* were the *only estates charged* or mentioned in his marriage settlement. But he was also entitled to a *reversion* of certain estates in the counties of *Oxford* and *Wilts.* Held that this *reversion* passed by the words "*elsewhere in the kingdom of Eng-* "*land.*" *Freeman* v. *Duke of Chandos.* 363

19. Devise to *S. S.* and the *heirs of his body* lawfully to be begotten, and *their heirs for ever, charged* with the payment of 8 *l. per annum* to *M. S.* during her life; but in case the said *S S. shall die without leaving issue of his body,* then unto *W. G.* and his *heirs, charged* as aforesaid, and *also* with 100 *l.* to *A. B.* within one year after *W.* or his heirs shall be possessed of the lands devised. *S. S.* takes only an *estate tail.* *Denn* v. *Shenton.* *410

20. One devises a *reversion* to *his right heirs,* and afterwards gives all the *residue* and remainder of his real and personal estate to *A. B.* in fee.—The *reversion* does not pass by this residuary devise *Doe* v. *Saunders.* 420

21. One devises, "*as to all such worldly estate as God has endued me with,* "I give as follows;" I devise *all* that "my *freehold messuage, lying* in G., to "*M. R., G. R.* and *T. R. equally.*" And afterwards, amongst other legacies, he gives *ten* shillings to his *heir* at law. The devisees, notwithstanding the *introductory words,* and the *disinheriting legacy* to the *heir,* take only an estate for *life,* and are tenants *in common* *Den* v. *Gaskin.* 657

22. To make such introductory words (No. 21.) operate as an *enlargement* of a devise of lands, *without* words of

of *limitation* added, they must be *connected* with such devise. *Den* v. *Gaskin*. *Page* 660

23. The court will make great use of the introduction of a will, in *favour* of the *clear intention* of the testator, and in favour of creditors, to make a real estate liable to debts. *Ibid. Ibid.*

24. I give to one "in fee-simple," or "all my estate," are *tantamount* to words of *limitation*. *Ibid. Ibid.*

25. One devises his lands to his brother for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of his brother in tail-male successively, remainder to his brother's daughters in tail; remainder to *his four sisters and a niece for their lives, share and share alike as tenants in common*, and not as joint-tenants, remainder to their *sons successively* in *tail*, remainder to their *daughters* in tail; *reversion* to *his own right heirs*. Then he devises to another sister only a small annuity.—The *four* sisters and the *niece* take *several* estates for life, with *several remainders* to their sons and daughters: And there are *no cross-remainders*. *Pery* v. *White*. 777.

26. One devises to his two brothers and his sister, and the *heirs of their bodies*, as *tenants in common*, and not as joint-tenants, and for *want of such issue* to his own *right heirs*: And then gives all the rest and residue of his goods and chattels, as well real as personal, equally between his said brothers and sister, share and share alike. The devisees take *cross-remainders*. *Phipard* v. *Mansfield*. 799

27. By a devise, of *all that* the testator's *manor* of C, &c. and also *all* that his capital messuage, and *all* and every his *lands* tenements and hereditaments whatsoever, *situate and being in or near P. P.* or ELSEWHERE *in the county of Gloucester*, to his executors, upon *trust* to *sell* and divide the money *equally* amongst his younger children; a *remote reversion* in *fee*, in another estate in the *county of Gloucester*, to which the testator was entitled, after three estates tail, was held to pass to the trustees. *Atkyns* v. *Atkyns*. 805

28. A testatrix devised a messuage and lands to her eldest daughter *A.* and the *heirs of her body for ever*, and for *want of such issue* to her 2d, 3d, and 4th daughters successively *in tail*, *charged* and *chargeable* nevertheless with 180 *l.* to be levied out of the first *annual profits*, and to be divided *equally* amongst the *three younger daughters*: And that the *executors* should *stand seised* of the said messuage and lands, from the decease of the testatrix, *for so long time* as they or their assigns should have *raised* the said sum, or *so long as until* the same should be discharged by the said *A.* or *her heirs*: And *from* and immediately after the *raising*, &c. or *other payment* of the said sum, by *A.* or *her heirs*, then that *A. and her heirs* should enjoy the said messuage, &c. *for ever*; only allowing the three younger daughters and a cousin, the use of some rooms, till they were married. Held, that *A.* took only an estate *tail*. *Hanson* v. *Fyldes*. *Page* 833

Vide REMAINDER, No. 1, 2, 3. TENANTS *in Common*, No. 2.

DISCHARGE.

Vide ARREST, No. 2, 4.

DISCONTINUANCE.

1. Cannot be worked by a secret feoffment by tenant in tail under a *naked* possession. *Doe* v. *Horde*. 702

DISFRANCHISEMENT.

Vide CORPORATION, No. 7, 8, 9.

DISSEISIN.

1. Possession under a judgment in ejectment, can never amount to a *disseisin* of the *freehold*. *Doe* v. *Horde*. 701

2. But such possession (No. 1.) enures, according to the right of the party recovering, whether it be a right of freehold in possession, in tail, or in fee. *Ibid.* *Ibid.*

3. A *secret feoffment* under a *naked* possession by tenant in tail in remainder

to

to the mere intent to make a tenant to the *præcipe*, cannot *work* a disseisin to the *advantage* of the *feoffor*. *Doe* v. *Horde*. *Page* 702

. But the *true owner* may *elect* to *make* it a disseisin. *Ibid*. *Ibid*.

DISTRESS.

1. Cannot be made for the toll of goods *fraudulently* sold *out* of a *market* to avoid the *toll*. But the party injured must bring a *special action* on the case. *Blakey* v. *Dinsdale*. 661

E.

ECCLESIASTICAL COURT.

Vide PROHIBITION.

EJECTMENT.

1. A man shall not defend himself in it, by an estate which makes part of the title of the lessor of the plaintiff. *Hart* v. *Knott*. 45
2. If the lessor of the plaintiff be an *infant*, and the *guardian* undertake for *costs*, it is sufficient. *Anonymous*. 128
3. The lessor of the plaintiff in ejectment shall not be permitted to defeat *a solemn deed under his own hand*, covenanting that the defendant shall *enjoy* the premises, and for further assurance. *Goodtitle* v. *Bailey*. 537

Vide NOTICE, No. 4. TRUST, No 2.

ELECTION. ELECTOR. ELECTED.

1. Where money is given to be laid out in *land*, or *government security*, a *common person* has his *election*; but a *charity* has *not*; because one alternative is unlawful. *Foone* v. *Blount*. 467

Vide CORPORATION, No. 10, 11, 12, 13, 14, 15, 16, 17. EVIDENCE, No. 7.

EMBARGO.

Vide INSURANCE

EQUITY.

Considers that which is *to be* done as if it *was* done, &c. *Foone* v. *Blount*. *Page* 467

Vide POWERS, No. 4.

ERROR.

1. On a writ of error from the *King's Bench*, in *Ireland*, only a *transcript* of the record is sent over to the *B. R.* in *England*; and if the judgment be affirmed, such transcript is sent back by writ of *mittimus* to the *King's Bench* in *Ireland*, and that court must issue the subsequent process. *Vicars* v. *Haydon*. 843
2. So on a writ of error from the *B. R.* in *England* to the *House of Lords*, only a *transcript* of the record is sent up; and when remitted, the *King's Bench* awards execution. *Ibid*. *Ibid*.
3. But on a writ of error from the *C. B.* though a transcript only is removed into the *King's Bench*, the *latter* may award execution. *Ibid*. *Ibid*.

ESCAPE.

Vide EVIDENCE, No. 3.

ESTATE for *life*, in *tail*, or in *fee*.

Vide DEVISE.

EVICTION.

Vide RENT, No. 1, 2.

EVIDENCE.

1. In an action upon a *wager* whether a decree of the court of *Chancery* would be reversed on appeal to the House of Lords, a *copy* of the *reversal* is sufficient evidence, *without* producing the *minute book* itself; and such copy need *not* be on *stamps*; neither is it necessary, on the trial of such an action, to shew the previous proceedings: Proof of the decree, and of its being reversed, is sufficient. *Jones* v. *Randall*. 17
2. Parol evidence must be let in to explain the intent of the testator in cancelling

celling a will. *Burtenshaw* v. *Gilbert.* Page 53

3. In debt for an escape against the sheriff, the indorsement of *non est inventus* upon the *ca. sa.* is sufficient evidence of its having been delivered to him. *Blatch* v. *Archer.* 63

4. A legal arrest must be proved in such action (No. 3.) *Ibid.* *Ibid.*

5. The bailiff's name endorsed on the writ is sufficient evidence that he was *authorised* by the sheriff to arrest, without proving the warrant. *Ibid.* 66

6. A sentence of expulsion (unappealed from) given in evidence on an indictment for assaulting a fellow commoner of *Queen's College, Cambridge*, by turning him out of the garden, is *conclusive* for the defendant; and consequently, evidence on the part of the prosecutor, to prove the irregularity of such sentence, is inadmissible. *Rex* v. *Grundon.* 315

7. Evidence of an *order* of *restoration* of a burgess, together with proof of his having acted as such, is sufficient to shew that he is a burgess *de facto*, *without* proving that he was *actually admitted*. *Symmers* versus *Regem.* 502

8. An *order* of *restoration* of a voter illegally disfranchised, *relates* to the *original* right, and may be given in evidence to shew that his vote at an election ought to have been received; though such election were had, prior to the date of the order. *Ibid.* 503

9. *General declarations* of a parent are good evidence after his or her death, to prove *that a child was* BORN *before marriage*; but *not* to prove that a *child, born in* WEDLOCK, *is a bastard*. *Goodright* v. *Moss.* 591

10. So, the *answer* of one of the parents to a bill in *Chancery*, is admissible to prove such birth: For it is not like offering a deposition or an answer in evidence, against a person not a party to the original suit: But it is offered only as evidence under her hand of her having made such a declaration. *Ibid.* 594

11. So, parents may be admitted to prove the *fact* of the *marriage* on a question upon the legitimacy of the child. *Ibid.* 593

12. But *not* to prove *non-access*. *Goodright* v *Moss.* Page 594

13. *Tradition* is evidence in questions of *pedigree*. *Ibid.* *Ibid.*

14. So are *circumstances* that shew *illegitimacy*. *Ibid.* *Ibid.*

15. So are an entry in a family Bible, an inscription on a tombstone, or a pedigree hung up in the family mansion. *Ibid.* *Ibid.*

16. How far possession of twenty years is evidence of a fee, and when it may be presumed. *Denn ex dim. Tarzwell* v. *Barnard.* 595

17. *Indecency* of evidence is no objection to its being received, where it is *necessary* to the decision of any *civil* or *criminal* right. *Da Costa* v. *Jones.* 734

18 *Secus*, if it arise upon a *voluntary wager* between two *indifferent* persons: as, upon a wager concerning the *sex* of a *third* person. *Ibid.* 736

19. In a question upon the *custom* of *tithing* in the parish of *A.*, evidence that such a custom exists in the *adjacent parishes*, is *not admissible*. *Secus*, if the custom be laid as the *general custom* of the *whole county*. *Furneaux* v. *Hutchins.* 807

EXCEPTIONS.

Vide BILL of EXCEPTIONS.

EXCHANGE.

Vide BILL of EXCHANGE.

EXCISE.

1. The bounty allowed on the exportation of strong beer by stat. 1 *G.* 3. *c.* 7. *sect.* 6. (which refers to stat. 1 *W.* & *M. c.* 12.) must be governed by the *price* of barley at the *port* where *exported*, and *not* by the *average* price throughout the kingdom. *Whitbread* v. *Brooksbank.* 66, 9

Vide ACTION, No. 1. BOUNTY, No. 1, 2.

EXECUTION.

Vide BAIL, No. 2. ERROR, No. 1, 2, 3. WARRANT of ATTORNEY, No. 2.

EXECUTOR.

1. On a *personal* demand against an executor, there can be no judgment *de bonis testatoris*. *Hawkes & Ux.* v. *Saunders*. *Page* 289
2. Having assets is a sufficient consideration for a promise by him to pay a legacy. *Ibid.* 290
3. Declaration, that G. S. *by will bequeathed a legacy to the plaintiff, and made the defendant executrix; that she proved the will, and had assets sufficient to pay all debts and legacies, and by reason thereof became liable to pay the legacy, and being so liable, promised, &c.* is a declaration against the defendant *in her own right*; and therefore the plaintiff cannot take judgment *de bonis testatoris*. *Ibid.* 292
4. But, if *assets* be *proved* (or *admitted*) and an assent of the executor to the legacy, judgment may be given, on such a declaration, *de bonis propriis*; because, having assets is a sufficient consideration. *Hawkes et Ux.* v. *Saunders*. 293
5. *Quære*, Whether, *without such assent*, (No. 4.) he could be compelled by an action *at law* to pay it? *Ib.* 292
6. What actions survive against an executor. *Hambly* v. *Trott*. 375
7. Distinction, as to actions which *survive* against an executor or *die with the person*, on account of *the cause of action*, and which *survive*, &c. or *die*, &c. on account of *the form of action*. *Ibid.* *Ibid.*
8. Where the *cause* of action is money due; or a contract to be performed; gain or acquisition by the labour or property of another; or a promise by the testator expressed or implied, the action survives against the executor. *Secus*, if it be a *tort* or arise *ex delicto*, supposed to be by force and against the peace, or where the plea to the action must be, that the *testator* was *not* guilty. *Ibid.* *Ibid.*

Vide Action, No. 7. Assumpsit, No. 4, 5.

EXEMPTION.

Vide Impressing Seamen.

F.

FACTOR.

1. A FACTOR who is surety (in a bond) for his principal, has a lien on the price of the goods sold by him for his principal to the amount of the sum he is bound for. *Drinkwater* v. *Goodwin*. *Page* 251
2. It is a general rule, that where a factor who is authorised to sell goods in his own name, makes the buyer *debtor* to *himself*; though he is not answerable to his principal for the *debt*, if the money be not paid, yet he has a right to receive it, if it is; and his receipt is a discharge to the buyer. *Ibid.* 255, 6
3. He may compel such payment (No. 2.) by an action; and it would be no defence in such action for the buyer to say, that the principal was indebted to him in more than that amount. *Ibid.* *Ibid.*

Vide Indemnity.

FALSE IMPRISONMENT.

Vide Trespass.

FEES.

1. If an offender convicted in *B. R.* receive sentence to be set on the pillory in a different county, the prosecutor is not bound to pay the tipstaff any fees, or even the necessary expences of carrying the offender thither. *Rex* v. *Cholsey*. 726

FEME COVERT.

Vide Baron and Feme.

FEOFFMEMT.

1. The nature and operation of feoffments of old, attended with livery and actual transmutation of the possession from one man to another. *Doe* v. *Herde*. 702—704
2. The nature and operation of a *secret* feoffment, with livery in *form* only *to the mere intent to make a tenant to the præcipe*, by one who has *not* a *right* to suffer a recovery. *Ibid.* *Ibid.*

3. No transmutation of the possession passes to the *feoffee* by it. But he is a mere *instrument of form*. *Ibid.* Page 704
4. It conveys no estate, nor will courts of law carry it into execution, to the *prejudice* of the rightful owner. *Ibid.*

FICTION.

1. A fiction of law shall never be contradicted so as to defeat the end for which it was invented; but for every other purpose it may be contradicted. *Mostyn* v. *Fabrigas.* 177
Vide WRITS, No. 1.

FINE.

1. In proving it, you must shew that the conusor was in possession, or had received rent. *Doe* v. *Williams.* 622

FOREIGN LAWS.

1. Must be proved as facts if a question arise on their existence. *Mostyn* v. *Fabrigas.* 174

FORFEITURE.

Vide ACCEPTANCE of RENT. COVENANT, No. 7. PENALTY.

FRAUD.

1. The statutes 13 *Eliz.* c. 5. and 27 *Eliz.* c. 4. cannot receive too liberal a construction, or be too much extended in suppression of fraud. *Cadogan* v. *Kennet.* 434
2. But such a construction is not to be made in support of creditors, as will make third persons sufferers. *Ibid.* *Ibid.*
3. If a transaction be not *bonâ fide*, its being for a *valuable consideration*, will not *alone* take it out of the statute; nor even in some cases a change of possession. *Ibid.* *Ibid.*
4. Thus, the purchase of a debtor's goods, knowing of a sequestration by *Chancery*, or of a judgment and execution, though made for a valuable consideration, is void. *Ibid.* *Ibid.*
5. Possession of *goods* is evidence of fraud. *Secus* of a lease. *Ibid.* *Ibid.*
6. The statute 27 *Eliz.* c. 4. does not go to *voluntary* conveyances, *merely* as being *voluntary*, but to such as are *fraudulent*. (See No. 8.) *Ibid.* Page 434
7. The circumstance of a man's being indebted at the time of a voluntary conveyance, is an argument of fraud. The question, therefore, is, Whether it was done *bonâ fide*, or to *defeat creditors*? *Ibid.* 435
8. To make a *voluntary* settlement *void* against a subsequent purchaser, within the statute 27 *Eliz.* c. 4 it must be *covinous* and *fraudulent*, not *voluntary* only. *Doe* v. *Routledge*, 705. 708.
9. A purchaser, to entitle himself to the protection of the stat. 27 *Eliz.* c. 4. against a *fraudulent* settlement, and to *set it aside*, must be a purchaser *bonâ fide*, or for *good consideration*, or *marriage*. *Ibid.* *Ibid.*
10. But he need not be a purchaser for *money*. *Ibid.* *Ibid.*
Vide ASSUMPSIT, No. 2, 3. SETTLEMENT, No. 3.

FREE-BENCH.

Vide COPYHOLD, No. 1, 2.

G.

GAME.

VIDE DECLARATION, No. 5.

GAMES.

1. Playing at *bowls*, *out of Christmas*, subjects every *labourer* to a penalty of 20 *s.* by stat. 33 *Hen.* 8. *c.* 9. sect. 16.; but does not make such offender punishable as an *idle and disorderly person*, under stat. 17 *Geo.* 2. *c.* 5. *Rex* v. *Clarke.* 36

GAMING.

A *foot-race* is a game within the stat. 9 *Anne*, c. 14. therefore any wager upon

upon it, is void; and one person running alone (against time) is a foot-race, within the statute. *Brown* v. *Berkeley*. *Page* 281
Vide Wager.—*Vide* Assumpsit, No. 13, 14.

GRANT.

Vide Presumption, No. 1, 2. Limitation, No. 2.

H.

HABEAS CORPUS.

1. AN information, *qui tam*, on stat. 8 *G.* 1. *c.* 7. for a fraud in weighing and packing butter, exhibited (by virtue of the said statute) in the sheriff's court at *York*, may be removed into *B. R.* by *hab. corp. cum causâ*. *Hartley qui tam* v. *Hooker*. 523
2. A writ of *habeas corpus*, if not signed by a judge, need not be obeyed. *Rex* v. *Roddam*. 672
3. A writ of *habeas corpus ad testificandum*, to bring up a sailor on board a ship, who is *not* detained there as a *prisoner*, ought *not* to be granted, *without* an affidavit, that he has been *served* with a *subpœna*, and is *willing* to *attend*. *Ibid.* *Ibid.*

HEIR.

1. An heir at law cannot be disinherited by the plainest intention apparent on the face of the will, unless the estate is completely disposed of to somebody else. *Denn* v. *Gaskin*. 661

Vide Devise.

HIGHWAY.

1. Must, in a presentment, be alleged to lie *in the parish*; otherwise, the parish is not bound to repair. *Rex* v. *Inhabitants of Hartford*. 111
2. The power of two justices, under stat. 13 *G.* 3. *c.* 78. *s.* 16. to order any highway to be widened, extends to roads repairable *ratione tenuræ*; and upon disobedience to such order, the party may either be proceeded against summarily under the statute, or by indictment. *Rex* v. *Balme*. *Page* 648

HUNDRED. *Vide* Constable.

I.

IDENTITY.

1. OF money or notes, if it can be traced, will entitle the true owner to maintain *assumpsit* against a *third* person, into whose hands they have come *malâ fide*. *Clarke* v. *Shee et al.* 197—200.

Vide Action, No. 4.

JEOFAILS.

The statutes of jeofails extend to *penal* actions, though not to criminal prosecutions. *Atcheson* v. *Everitt*. 392

IMPLICATION.

1. Where lands are devised *without words* of *limitation*, and the lands are *charged with a gross sum*, the devisee by implication of law takes a *fee*; because the manifest intent of the testator being decisive, and no technical form of words necessary to express it, the certainty that the testator must mean a bounty to his devisee is sufficient to supply the want of a formal limitation. *Doe* v. *Fyldes*. 841
2. But where an *express* estate for *life*, or an *express* estate *tail*, is given in terms, no such implication can arise from such charge only. *Ibid.* *Ibid.*

INDEMNITY.

1. It is not in the power of any man, by his election, to vary the rights of two other contending parties. And therefore, if after giving notice to such person to hold his hand, and offering him an indemnity, he takes upon himself to decide the right, he renders

ders himself answerable to the true owner. *Drinkwater* v. *Goodwin*. *Page* 255

2. For this reason, though a purchaser of goods from a factor has a right to pay him the money and be discharged; yet, if the principal and factor have a dispute, the buyer, with notice of such dispute, and an indemnity offered him, has no right to prejudice the title of the principal. *Ibid.* *Ibid*

INDICTMENT.

1. *Knowingly exposing to sale* and selling wrought *gold under* the sterling *alloy*, as, and for, gold of the true standard weight, is not indictable in a *private* person: the statutes relate only to *goldsmiths*.—And it is not a common law offence, being only a private cheat. *Rex* v. *Bower*. 323
2. An indictment consisted of two counts; one for a *riot*, the other for an assault; and the jury indorsed *ignoramus* on the first, and *billa vera* on the second: And it was held *good*. *Rex* v. *Fieldhouse*. 325

Vide Variance, No. 2, 3.

INDORSEE.

Vide Bill *of Exchange*, No. 1. Insolvent *Debtor*, No. 1. Lien, No. 1.

INFANT.

Cannot be elected a burgess of *Portsmouth*, though not sworn in till of age. *Rex* v *Carter*. 226

Vide Ejectment, No. 2.

INFERIOR *Courts*.

1. Justification (to an action of assault and false imprisonment) by process out of an inferior court, stated, "that "the plaintiff below levied his plaint "in a plea of trespass on the case, "*for a cause of action arising within* "*the jurisdiction of the court*.—And "held good, *without* setting forth "*the cause of action*, or that the de-"fendant *became indebted within the* "*jurisdiction*." *Rowland* v. *Veale*. 18
2. Formerly nothing was presumed in favour of the regularity of their proceedings, nor could they be set out with a *taliter processum*: but these objections have of late years been over-ruled. *Rowland* v. *Veale*. *Page* 19
3. If the cause of action does not arise within the jurisdiction, the defendant must avail himself of it by plea in the court below; or, if not alledged in the plaint to be within the jurisdiction, he must bring error or false judgment. *Ibid.* 20
4. Where the *capias* (from the court below) is under process of *execution*, it needs not be shewn in the justification, *that the precept was returned*; otherwise, when it is under *mesne process*. *Ibid.* *Ibid.*
5. The court was held *from three weeks to three weeks*; and the writ was, to have the body at the *next court generally*: It is good, and a day certain need not be shewn. *Ibid.* 21

INFORMATION.

1. *One* information may, by *leave of the court*, be exhibited under the *Irish* statute 19 *Geo.* 2. *c.* 2. *sect.* 4. against *different* persons, and against the *same* persons, for usurping *different* franchises; and there is *no* necessity to *state* such leave upon the *record*. *Symmers* v. *Regem*. 489

Vide Arrest *of Judgment*, No. 1, 2. Libel, No. 1, 2, 3, 4. Quarter Sessions, No. 1. Penalty, No. 1. 6.

INFORMER.

Vide Costs, No. 1. 5, 6, 7.

INSOLVENT *Debtor*.

1. An indorsee of a promissory note, payable three months after date, may be discharged under an insolvent act which takes place *before* the three months are expired. *Workman* v. *Leake*. 22
2. So may the obligor of a bond conditioned for payment of money at a future day, though the act took place *before* the day limited by the condition

tion for payment. *Paget* v. *Wheate.* (in a note.) *Page* 23

3. Under the stat. 16 *Geo.* 3. *c.* 38. a debtor shall not be discharged of any debt contracted *after* the 22d of *January* 1776, though it was contracted *before* the defendant's discharge. *Ernst* v. *Sciaccaluga.* 527

INSPECTION.

1. Persons empowered by stat. 3 *G.* 3. *c.* 15. to inspect the entries of freemen, have a right to inspect ALL books, papers, &c. in which the admissions of freemen are entered. *Schuldam* v. *Bunniss.* 192

INSURANCE.

1. If a ship insured *at* and *from Jamaica*, *warranted* to have sailed on or before a certain day (with return of part of the premium, in case of convoy) sail on or before the day from her *port of lading*, with all her cargo, &c. on board, to the usual place of rendezvous at another part of the island, for the sake of joining convoy there *ready*, it is a compliance with the warranty, though she be afterwards detained there by an *embargo* beyond the day.—And though such place of rendezvous be out of the *direct* course of the voyage, it is *no deviation.* *Bond* v. *Nutt.* 601

2. Upon a policy at and from such a port to any other port or place whatsoever for *twelve* months, at 9 *l. per cent.* warranted free from capture, the risk is *entire*; and therefore, if *once begun*, there shall be *no return* of premium. *Tyrie* v. *Fletcher.* 666

3. There are two *general* rules. 1. That wherever the risk has *not begun*, to whatsoever cause it may be owing, the *premium* shall be *returned.* *Ibid.* 668

4. Secondly, That wherever the risk has *once begun*, though it cease immediately after, there shall be *no apportionment* or return of premium. *Ibid.*

5. In a policy upon a *life* for twelve months, with an exception of *suicide*, the risk is *entire*; and if the party put an end to his existence the *next instant*, there shall be *no* apportionment or return of premium. *Ibid.* *Page* 669

6. *Quære*, If in a policy upon a ship *at* and *from* such a port, warranted to depart on a day certain, the risk and contract are *not divisible*; *viz.* *one* risk during the ship's stay in port, and *another* after her departure on the day? 670

7. Upon a policy at and from *London* to *Halifax*, warranted to depart with *convoy* from *Portsmouth*, the contract and *risk* are *divisible*; *viz.* from *London* to *Portsmouth* is one contingency; from *Portsmouth* to *Halifax* with convoy, is another: Therefore, where the ship departed from *Portsmouth* without convoy, by which means the *second* risk did *not begin*, it was held there should be a return of premium. 669

8. If a ship, warranted to sail on or before a particular day, be prevented from sailing by an embargo, the warranty is not complied with. *Hore* v. *Whitmore.* 784

9. A *warranty* inserted in a policy of insurance must be *literally* and *strictly* complied with. *Pawson* v. *Watson.* 785

10. A *representation* to the underwriter need only be *substantially* performed. *Ibid.* *Ibid.*

11. But if *false* in a *material* point, it will *avoid* the policy.—And in that case, a misrepresentation to the first underwriter will affect the policy with respect to all the subsequent underwriters. *Ibid.* 786—8, 9

12. Distinction exemplified.—In a life policy, if a man *warrants* another to be in *good* health, knowing he is *ill*, *that* will not avoid the policy, because he takes the *risk* upon *himself.* *Ibid.* . . 788

13. But if there is no warranty, and he says "the man is in *good health*," *knowing* him to be *ill*, or knowing *nothing* about his state of health, it is a falsehood, that will avoid the policy. *Ibid.* 788

14. *Secus*, if not knowing whether the party is well or ill, he says, "he believes he is in good health." *Ibid.* *Ibid.*

Vide WAGER, No. 3. 9.

JOINDER *in Action.*

1. An action on stat. 3 *Geo.* 3. *c.* 15. for refusing inspection of corporation books will lie against the bailiffs, *&c.* of a borough jointly, if *more* than *one*; though the words of the statute are in the singular number bailiff, *&c.* *Schuldham* v. *Bunniss.* *Page* 192

JOINT-TENANTS.

Vide Tenants *in common.*

JOURNALS.

1. *Copies* of the proceedings of parliament entered upon the journals are *evidence*, and need *not* be *stamped.* *Jones* v. *Randall.* 17

JOURNEYMAN.

1. Trespass on the case lies by a master for seducing his journeyman from his work, as for any other servant. *Hart* v. *Aldridge.* 54
2. So, if he be employed only by the piece. *Ibid.* 55

JUDGMENT.

1. In debt for a penalty, for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the stat. 8 & 9 *Will* 3. *c.* 11. but then it can stand only as a *security* for the *damages sustained.* *Goodwin* v. *Crowle.* 357
2. So in cases where the court of *Chancery* orders a judgment to be given as a security. *Ibid.* 359
3. If upon an information filed by the Attorney General against several defendants for a *several* offence, *all* the defendants be found guilty, a motion in arrest of judgment by *all* is proper. *Rex* v. *Clarke.* 611, 12
4. *Secus*, where such information (No. 3.) charges a joint offence, because the Attorney General may enter a *noli prosequi* against one or more. *Rex* v. *Clarke.* *Ibid.*
Vide Fraud, No. 4. Jurors and Jury, No. 1.

JURISDICTION.

1. If trespass and false imprisonment be brought against a governor appointed by letters patent under the crown, for wrongfully imprisoning the plaintiff during the term of such defendant's acting as governor, the king's courts in *England* can alone have jurisdiction: Because such governor is in the nature of a viceroy; and therefore *locally during his government*, no civil or criminal action will lie against him. *Mostyn* v. *Fabrigas.* *Page* 172, 3
2. Such offence also (No. 1) is a species of abuse of the authority delegated to him by the letters patent: And therefore, cognizable only in the King's courts: For no question concerning the seignory can be tried within the seignory itself. *Ibid.* *Ibid.*
3. If jurisdiction be given by statute to a superior court *of common law* to try a *new* offence created by statute, the proceedings may be removed into *B. R.* by *habeas corpus*, *certiorari*, or writ of *error*, unless expressly taken away.—*Secus*, if the statute prescribes a *special* jurisdiction, *not known to the common law.* *Hartley qui tam* v. *Hooker.* 524
Vide Abatement, No. 1, 2. Error, No. 1, 2, 3.

JURORS *and* JURY.

1. Judgment upon a writ of enquiry set aside, because the jury were returned by the attorney for the plaintiff. *Baylis* v. *Lucas.* 112
2. With regard to the striking out the twenty-four from a special jury, *vide* *Rex* v. *Hart.* 412

JUSTICE *of* PEACE.

Vide Quarter-sessions, No. 1. Pardon, No. 3. Rate, No. 1. 8.

JUSTIFICATION.

1. There may be cases in which a governor of a garrison may have a justification, in time of *war*, which he

would not have in time of *peace* *Mostyn* v. *Fabrigas*. *Page* 173

2. Whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried. *Ibid.* 175

Vide ACTION, No. 2. INFERIOR COURTS, No. 1. 4.

K.

KING.

1. THE King may grant the duties of a port to a subject, in consideration of repairing the port. *The mayor of Hull* v. *Horner*. 108
2. The King in council can no otherwise punish any of the governors of his foreign possessions, than by removing them, and taking away any commissions which they may hold, during his pleasure. *Mostyn* v. *Fabrigas*. 175
3. The King has a right to a legislative authority over a conquered country, till he has done some act that amounts to a waver of it. *Calvin's* case, 7 *Rep.* 17. *b.* cited in *Campbell* v. *Hall*. 213
4. *Quære*, if the crown may not by its prerogative grant an exemption from being impressed? *Rex* v. *Tubbs*. 520, 1

L.

LANDLORD.

VIDE RENT, No. 3.

LATITAT.

1. By the general rule and course of the *King's Bench*, the *bill* is the *commencement of the suit*: And the *latitat*, except where it is replied to the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action in point of time, is considered but as *process*. *Foster* v. *Bonner*. *Page* 454
2. Therefore the time of suing it out, except in the cases above mentioned, is *immaterial*. *Ibid.* *Ibid.*
3. It may bear *teste before* the cause of action. And if a trespass or injury be proved before the bill filed, it is sufficient. *Ibid.* 455
4. But in the excepted cases above stated (No. 1.) the time of suing out a *latitat* is material. *Ibid.* 456
5. As where upon an action brought upon the stat. 8 *Geo.* 1. *c.* 19. (which directs all prosecutions upon it to be brought *before the end of the next term* after the offence committed) it was manifest upon the *face* of the *declaration* that it was out of time, the *memorandum* being of *Trinity* term, and the *declaration* stating that the defendant, after the *first* day of *Hilary* term and *before* the exhibiting the plaintiff's bill, *viz* on the 27th of *January*, kept a lurcher: Yet upon proof at the trial, that the *latitat* was sued out *within time*, it was holden sufficient. *Ibid.* *Ibid.*
6. In all such cases, the defendant is entitled, as well as the plaintiff, to shew the true time of the *latitat* issuing. *Ibid.* *Ibid.*

LEASE.

1. If *void* against a remainder-man, cannot be set up by his acceptance of rent; and if only *voidable*, yet, acceptance of rent is not of itself a confirmation. *Jenkins* v. *Church*. 482
2. Of 2000 years, no man has it as a lease; but as a *term* to attend the inheritance. *Denn* v. *Barnard*. 595

LEGACY.

1. *Quære*, How far a court of common law has concurrent jurisdiction with the ecclesiastical court and courts of Equity in matters of legacy? *Atkins* v. *Hill*. 287

Vide ASSUMPSIT, No. 4, 5. EXECUTOR, No. 2, 3, 4.

LETTERS *Patent*.

1. Questions concerning the effect or extent of them, can only be tried in the King's courts. *Mostyn* v. *Fabrigas*. 175

Vide JURISDICTION, No. 1, 2.

LETTERS.

Vide POST-OFFICE.

LIBEL.

1. Upon an information for writing and publishing a libel *of and concerning the King's government and the employment of his troops* (setting forth the libel *verbatim*) the words "*of and* "*concerning*" are a sufficient *introduction* of the *matter* contained in the libel, and a sufficient *averment* that it was written "of and concerning "the King's government and the "employment of his troops." *Rex* v. *Horne.* *Page* 672
2. The *gist* of every *charge* of every *libel*, consists in the *person* or *matter*, *of* and *concerning whom*, or *which*, the words are averred to be *said* or *written*. *Ibid.* 679
3. All circumstances necessary to constitute the crime, must be set out. *Ibid.* *683
4. Where the writing is so clear as to amount of itself to a libel, all foreign circumstances introduced upon the record are unnecessary. *Ibid.* *Ibid.*
5. Where the libel does not in itself contain the crime without *extrinsic* aid, such extrinsic matter must be put upon the record by *averments*: If *new* matter, by way of *introduction*; if matter of *explanation* only, by way of *innuendo*. *Ibid.* 684
6. This doctrine illustrated at large. 682 to 689

LICENCE.

1. A rector gives a certificate appointing *A. B.* his curate, promising to pay him a salary, &c. The bishop ordains him upon this title: This is a licence within the meaning of the canon law. *Martin* v. *Hind.* 443
2. At least it is so, as between the rector and curate. *Ibid.* *Ibid.*
Vide CERTIFICATE, No. 2. CURATE, No. 1.

LIEN.

1. The indorsee of a bill of exchange who has received a certificate or navy bill as *his security* (though assigned to the drawee) for payment of the bill of exchange, has a lien on such certificate in the hands of the drawee, to whom he (the indorsee) had sent it. *Pierson* v. *Dunlop* *Page* 571
2. Whoever supplies a ship with necessaries has a treble security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners. *Rich* v. *Coe.* 639
Vide FACTOR. VENDOR and VENDEE, No. 3.

LIMITATION.

1. The statute of limitations is a *positive bar*. But there are cases not within the statutes, where the court has thought that a jury might presume any thing to support a length of possession. *Eldridge* v *Knott.* 215
2. Though the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. *Ibid.* *Ibid.*
3. But there is no instance of setting up any length of time, within the limitation fixed by the statute, as a *bar* to the demand. *Ib.* 216
4. In the case of tenants in common, if one is in possession, and on demand by the co-tenant of his moiety, *denies to pay*, and *denies his title*, and continues in possession; such possession is *adverse*, and amounts to an *ouster*; so that the statute of limitations will run. *Doe* v. *Prosser* 218
5. Where a man devises his estate for payment of debts, a court of equity says (and a court of law would say) all debts barred by the statute of limitations shall come in. *Trueman* v. *Fenton.* 548
6. If a statute for allotting lands within a manor, direct all disputed claims to be tried by a feigned issue, and *limit* the time of bringing it to *six months*, an action brought against a copyholder within time, and abated by his death, must be *revived* against the *heir*, *within six months* after the plaintiff *has notice of the descent*, though the heir had not been *admitted* till long after that time. *Knight* v. *Bate.* 738
Vide PRESUMPTION, No. 1, 2, 3, 4, 5.

LONDON.

1. Upon an act of parliament empowering *the mayor, aldermen, and commonalty in common council assembled*, to take certain steps for the compulsive purchase of lands wanted for a road; an order of sessions stated these steps to have been taken by the *mayor, commonalty and citizens*; and it was held bad: though the *latter* is the *name* of the *corporation at large*, and therefore in *fact* includes the *former* body. *Rex* v. *Croke*. *Page* 29
2. The liberties of *London*, are a *corporate*; *suburbs*, a *natural* denomination. *Jones* v. *Walker*. 628

Vide AUTHORITY. PRIVILEGE.

LORDS' ACT.

Vide ATTACHMENT, No. 1.

M.

MANDAMUS.

1. GRANTED to compel the warden of *Wadham* college to affix the common seal of the college to an answer of the fellows, &c in *Chancery*, contrary to his own separate answer put in. *Rex* v. *Wyndham*. 377
2. Where there is no other legal specific remedy, the course must be by mandamus. *Ibid*. 378
3. Upon a *mandamus* to churchwardens to restore *L. C.* to the office of sexton, a return, that *L. C.* was not duly elected according to ancient custom; and that there is a custom for the churchwardens and inhabitants to *remove* at *pleasure*, and that *L. C.* was *removed* pursuant to such custom, is good. *Rex* v. churchwardens of *Taunton St. James*. 413
4. The court will not grant a *mandamus* to restore a person, where it is confessed he was *rightly* removed, though he had no notice at the time, to appear and defend himself. *Rex* v. *Mayor of Axbridge*. 523

MALICIOUS PROSECUTION.

Vide NEW TRIAL, No. 1.

MANSLAUGHTER.

If an officer in the impress service, fire *in the usual manner* at the *hallyards* of a boat, in order to *bring her to*, and happen to kill a man, it is only *manslaughter*. *Rex* v. *Rowland Philips*. *Page* 830

MARRIAGE.

1. After a solemn declaration by a woman that she was married to a man, and that goods (in his possession) were his goods in her right; she shall never be allowed to say (at least against creditors), that she was not married to him, and that the goods were her sole property. *Mace* v. *Cadell*. 233
2. MARRIAGE SETTLEMENT. *Vide* SETTLEMENT, No. 3.

MERCHANTS.

Vide FACTOR.

MINES.

Lead mines are not rateable to the poor within the stat. 43 *Eliz. c.* 2: therefore the *adventurers* are excused; but the lord who receives a *certain stipulated* benefit from the profits, is expressly charged to the land-tax, and is also liable to the poor's rate in respect of such profits; being visible real property within the parish. *Rowls* v. *Gells*. 453

MORTGAGE, MORTGAGOR, MORTGAGEE.

1. A mortgagee is a purchaser within the stat. 27 *Eliz. c.* 4: and therefore, a *voluntary* settlement made by the mortgagor, after marriage, is void as against him. *Chapman* v. *Emery*. 278
2. A mortgagor shall never be permitted to dispute the title of his mortgagee. *Goodtitle* v. *Bailey*. 601

Vide NOTICE, No. 1, 2.

MURDER.

Vide MANSLAUGHTER.

MUSICAL COMPOSITION.

1. Is within the stat. 8 *Ann.* c 19. for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned. *Bach* v. *Longman.* *Page* 623
2. For it is a writing, though not in language, or letters. *Ibid.* *Ibid.*

N.

NEW TRIAL.

1. IN an action for a malicious prosecution, the jury found for the defendant, against evidence; but the court would not grant a new trial, as the suit was of a *criminal* nature. *Norris* v. *Taylor* 37
2. A new trial will seldom be granted in cases of personal torts for excessive damages. *Gilbert* v. *Burtenshaw.* 230
3. It ought not to be granted merely for the sake of turning the party round; but, where substantial justice cannot otherwise be obtained. *Goodtitle* v. *Bailey.* 601

Vide DAMAGES.

NON-RESIDENCE.

1. The statute, against *non-residence*, 21 *Hen.* 8. *c.* 13. is a *remedial* law: And though the *general* words of the act, "that every spiritual person shall "*reside in, at,* and *upon* his *benefice,*" might, in the case of a rector, be satisfied by his residing any where upon the living; the construction has been, that where there is a *parsonage house*, he must himself personally *reside in it.* *Wilkinson* v. *Allott.* 341
2. Residence in the parish, though within twenty yards of such parsonage house, and though his servants sleep in it, has been held not sufficient. 2 *Brownlow*, 54. cited. *Ibid.* *Ibid.*
3. *Impossibility* however, will *excuse*: as where from time immemorial there has been *no parsonage house.* *Ibid.* *Ibid.*
4. But in such case (No. 3.) the provision of the statute must be performed *cy pres*. and therefore he must *reside somewhere in the parish.* *Wilkinson* v. *Allott.* *Page* 431

Vide PARSON, No. 1, 2.

NONSUIT.

1. Where a plaintiff is nonsuited, the defendant is entitled to costs. Where the judgment is arrested, each party pays his own costs. *Cameron* v. *Reynolds.* 407
2. In trespass against *several*, if *any* suffer judgment by *default*, the plaintiff need only give evidence to affect the rest; and it is matter for the jury, whether the trespass proved be the same as that confessed; but the plaintiff *cannot* be *nonsuited.* *Harris* v *Butterley* 483
3. In ejectment, where the lessor of the plaintiff's own deed is set up against him, if colourable evidence of fraud or imposition upon the plaintiff be given, such fraud is a matter of fact to be left to the jury; and therefore a nonsuit would be wrong. *Goodtitle* v. *Bailey.* 599
4. So if there were proof that such deed (No. 2) were made under a mistake, because that would be equivalent to fraud. *Ibid.* 600

Vide COSTS, No. 6.

NOTICE.

1. If a road act (9 G. 3. *c.* 89) require notice in writing to be given to mortgagees of lands wanted, in order to compel them to assign their interest, it is not sufficient in an order of sessions to say, that *due notice* was given; but it ought to be stated to have been given in writing. *Rex* v. *Croke.* 30
2. Such defective notice (No. 2.) would not be cured by the appearance of the party. *Ibid.* *Ibid.*
3. If a settlement or other conveyance is *void* against a purchaser (within the stat. 27 *El.* c. 4.) notice to such purchaser makes no difference. *Chapman* v. *Emery.* 280
4. S. P. *Doe* versus *Routledge.* 711
5. But with respect to the *register act*, 7 *Ann.* c. 20. though it is positively said,

ſaid, that a regiſtered deed ſhall take place of an *un*regiſtered deed, equity will not ſet it aſide in favour of a party who knew of it at the time, becauſe he had that notice which the act of parliament intended he ſhould have. *Doe* v. *Routledge*. *Page* 711

6. When the poſſeſſion of a tenant is adverſe, it is not neceſſary to give him notice to quit, in order to ſupport an ejectment againſt him. *Doe* v. *Williams*. 622

Vide CORPORATION, No. 11. CURATE, No. 2. PARTNERS, No. 2. RATE, No. 8. SURPRISE.

NUDUM PACTUM.

A promiſe by a bankrupt, after the bankruptcy, to revive a debt due *before*, in conſideration of the creditors agreeing to take no dividend, is not *nudum pactum*. *Trueman* v. *Fenton*. 548

NUISANCE.

Vide CERTIORARI, No. 2.

O.

OATH.

1. UPON the principles of the common law, no particular form of oath is eſſential to be taken by a witneſs. *Atcheſon* v. *Everitt*. 384

2. Therefore, though the Chriſtian oath was ſettled in very early times, yet *Jews*, before their expulſion on the 18th of *Edward* the Firſt, were permitted, at common law, to be ſworn upon the Old Teſtament, and to give evidence in all caſes, criminal or civil. *Ibid*. 389—90

3. A Turk may be ſworn on the Alcoran, and give evidence on a criminal proſecution. *Ibid*. *Ibid*.

4. The teſtimony of a ſectary who refuſed to kiſs the book, but whoſe form of ſwearing was by opening the book, and lifting up his right hand, has been admitted in a civil action. 2 *Sid*. 6. cited. *Ibid*.

5. *Quære*, If perſons of ſuch ſect (No. 4.) might not be admitted as witneſſes in a proſecution for high treaſon? *Atcheſon* v. *Everitt*. *Page* 389—90

OFFICE and OFFICER.

1. The office of pariſh clerk is a *temporal* office; and though he be appointed by the miniſter, yet, if removed without ſufficient cauſe, a *mandamus* will lie to reſtore him. *Rex* v. *Warren*. 370

2. If the ſummoning bailiff, whoſe duty it is to ſummon jurors to try cauſes, take money of the inhabitants liable to ſerve, the court will grant an attachment againſt him. *Rex* v. *Whitaker*. 752

OVERSEERS.

Appointment of them on a *Sunday* quaſhed. *Rex* v. *Overſeers of Bridgewater*. 139

OWNERS and MASTER.

1. If *exorbitant* fees are taken by a Cuſtomhouſe officer from the *maſter* of a veſſel, upon his taking out a cocquet and bond, purſuant to the ſtat. 13 & 14 *Car*. 2. *c*. 11. *ſect*. 7; though the ſtatute impoſes the duty on the *maſter perſonally*, the *owners* may recover the *exceſs*, in *aſſumpſit for money had and received*. *Stevenſon* v. *Mortimer*. 805

2. Where a man pays money by his *agent*, which ought not to have been paid, *either* the *agent* or *principal* may bring an action to recover it back. *Ibid*. *Ibid*.

3. If money is miſpaid to a *known* agent, and an action brought againſt him for it, it is an anſwer to ſuch action, that he has *paid it over* to his principal. *Ibid*. *Ibid*.

Vide ASSUMPSIT, No. 10, 11, 12.

P.

PAPIST.

1. ONE ſeiſed of a real eſtate, bequeaths ſeveral pecuniary legacies,

gacies, and, as to some, directs they shall be paid to the full, whatever else, *debts excepted*, falls short; and then says, "In order to raise money "for these payments, my estate of "*B*. must be sold as soon as conve-"niently may be after my decease. "*To this end*, I do appoint and *em-"power* *C*. and *D*. whom I make "my executors, to *sell*, let, or set to "sale, both my estates of *B*. and *E*." Held, that a *Popish* creditor was entitled to his debt out of the *money arising by sale of the testatrix's* real estate, according to the appointment of the will. *Foone* v. *Blount*. *Page* 464

2. The laws against Papists are not to be extended by inference beyond what the reasons that gave rise to them require. *Foone* v. *Blount*. 466

3. Where lands are devised to trustees to be sold for payment of particular sums to certain persons, some of whom are Papists, the stat. 12 *W*. 3. *c*. 4. does not prevent such Papists from taking the said legacies. *Ibid*. 468

4. A Popish creditor cannot take a lease for years; but he may have a claim upon such lease, as assets. *Ibid*. *Ibid*.

PARDON.

1. There are *three* ways by which accomplices obtain a *right* to a pardon. *First*, By approvement; 2*dly*, By coming within the statutes 10 & 11 *W*. 3. *c*. 20. *s*. 5. and 5 *Ann*. *c*. 31. *s*. 4.; 3*dly*, by being entitled to it by the royal proclamation. *Rex* v. *Rudd*. 334

2. An accomplice, though not within any of the three foregoing cases, may, if admitted a witness under the *practice* allowed, if he behaves fairly, and discloses the whole truth, obtain a recommendation to mercy; but it rests upon his being a person properly within the *usage*, and upon his own behaviour in fully complying with the requisite conditions. *Ibid*. 336

3. A justice of peace has no authority to select whom he pleases, and to tell such offender he shall be a witness. *Ibid*. *Ibid*.

PARSON.

1. A sequestration of a benefice with cure is no excuse for the non-residence of the incumbent; and therefore a lease thereof made by him, will by such absence be rendered void within the stat. 13 *Eliz*. *c*. 20. *s*. 1. *Doe* v. *Meares*. *Page* 129

2. The want of a parsonage house is no excuse for his residing *out* of the parish. *Wilkinson* v. *Allot*. 429

PARTNERS.

1. If one of two partners commit a secret act of bankruptcy; the other partner may for a valuable consideration, and without fraud, dispose of the partnership effects; and though he himself afterwards become bankrupt, the assignees under a joint commission cannot maintain trover against the *bonâ fide* vendee of such partnership effects. *Fox* v. *Hanbury*. 449

2. If partners dissolve their partnership, persons who deal with either, *without notice* of such dissolution, have a right against both. *Ibid*. *Ibid*.

3. Respecting the rights of partners against each other, and of third persons against them, *vide ibid*. 449

4. The assignees under a commission of bankruptcy against one partner, can only be tenants in common of an undivided moiety, subject to all the rights of the other partner. *Ibid*. *Ibid*.

5. On a bankruptcy between partners, they are entitled as against each other to the balance of accounts. *Hague* v. *De Silva*. 469

6. If two are partners, as *attorneys* and *conveyancers*, and *one* receive money to be laid out on mortgage; the *other* is answerable for the amount, though his partner gave only his own *separate receipt* for it. *Willet* v. *Chambers*. 814

Vide BANKRUPT, No. 12.

PEER of PARLIAMENT.

May be sued in *B*. *R*. by original bill. *Gosling* v. *Ld*. *Weymouth*. 844

PENAL ACTIONS.

Are *civil* suits. *Atcheson* v. *Everitt*. 389

PENALTY.

1. The penalty of 10 *s. per* ton, imposed by stat. 8 *G.* 3. *c.* 38. for giving a false account of goods in a boat, is not to be calculated upon the gross weight of goods contained in the boat; but only upon the *difference* between the weight or quantity given in, and the weight or quantity contained in the boat. *Minors* v. *Houghton.* Page 585
2. On an information and verdict against *several* persons for obstructing a customhouse officer contrary to stat. 8 *G.* 1. *c.* 18. *s.* 25, *each* defendant is *separately* liable to the penalty imposed by the act. *Rex* v. *Clark.* 610
3. Where an offence made penal by statute, is, in its *nature, single*; one single penalty only can be recovered, though several join in committing it: But if the offence be in its nature *several*, each offender is *separately* liable to the penalty. *Rex* v. *Clark* 610
4. Thus the offence by stat. 1 & 2 *P.* & *M. c.* 12. (by impounding a distress in a wrong place) though done by many, is still but *one* act, and shall be satisfied by *one* forfeiture. So under stat. 5 *Ann c.* 14. killing a hare, is but *one* offence in its nature; but the stat. 8 *G.* 1. *c.* 18. *s.* 25. relates to an offence in its nature *several*. *Ibid.* 612
5. If a person not present were to have *procured* such offence to be done; he would be liable to the penalty. *Ibid.* *Ibid*
6. A person can commit but one offence on one day, against the stat. 29 *Car.* 2. *c.* 7. "by exercising his ordinary "calling on a *Sunday*." And if a justice of peace convict him of more than one penalty for the *same* day, it is an excess of jurisdiction for which an action will lie before the convictions are quashed. *Crepps* v. *Durden.* 640

PLEADING.

1. Plea to a bond conditioned for payment of money, that it was given as an indemnity against another bond, and that the plaintiff has not been damnified, is *bad*. *Mease* v. *Mease.* Page 47
2. If to an action by a sheriff, against a bailiff's surety, upon a bond for the performance of an indenture of covenant, to execute all warrants, and to pay over all money received by him, a plea of performance generally be put in; if the replication state a *particular* warrant, &c. to the said bailiff, and that he neglected to return it, &c. the plaintiff must conclude with an *averment*. *Sayre* v. *Minns.* 575
3. Other objections to the above plea (No. 2.) over-ruled. *Ibid.* *Ibid.*
4. *Riens in arrere* is a good plea to an action of *debt* for rent. *Warner* v. *Theobald.* 588
5. *Secus*, in an action of covenant: admitted *arguendo*. *Ibid.* *Ibid.*
6. To a *sci. fa.* on a judgment, the defendant can plead nothing in bar, which he might have pleaded to the original action. *Cook* v. *Jones.* 728
7. In a *qui tam action* in *B. R.* for insuring lottery tickets contrary to stat. 16 *G.* 3. *c.* 24. if a former action has been brought against the defendant in *C. B.* for the same offence, which he had leave to compound; the court will not stay the proceedings upon *his* affidavit of the above facts, but he must *plead* them specially. *Harrington qui tam* v. *Johnson.* 744

Vide COVENANT, No. 2. 4. DECLARATION. LIBEL. RENT, No. 1, 2. VARIANCE, No. 1. 4, 5.

POLICY *of Insurance.*

Vide INSURANCE.

POOR.

1. *Quære*, How far personal property is to be rated to the poor. *Rex* v. *Churchwardens of Andover.* 550

Vide RATE.

POSTMASTER GENERAL.

1. Is not liable *personally* for the value of a bank-note stolen, by one of the *sorters* of the Post-office, out of a letter delivered into the office: *Whitfeld* v. *Lord Le Despencer.* 754 to 766
2. He is not like a common carrier. *Ibid.* 764

3. Case, where the statute makes him liable for his own fault only. *Whitfeld* v. *Lord Le Despencer.* *Page* 765

POST-OFFICE.

1. A post-master is bound to deliver all letters to the inhabitants *in a post town*, at their respective places of abode, at the rate of postage established by act of parliament. *Smith* v. *Powditch.* 182
2. *Old-street* is within the *suburbs* of the city, being connected to it by a street of *contiguous* buildings before the stat. 9 *Ann.* c. 10: therefore (though it is not within the *liberties*) the Penny post-office is entitled only to one penny for the carriage and delivery of a letter there. *Jones* v. *Walker.* 624
3. Its establishment. *Whitfeld* v. *Lord Le Despencer.* 763
4. Statutes respecting it. *Ibid.* 764–766

POWER.

1. A power to appoint by *deed* executed in the presence of two witnesses, is ill executed by a *will*. *Secus*, had the power been to appoint by any *writing* or *instrument*, or other *general* term. *Earl of Darlington* v. *Pulteney.* 260
2. There is no distinction between equitable and legal executions of powers. *Ibid.* 266
3. When the power is executed for a meritorious consideration, the precise form need not be strictly pursued. *Ibid.* 267
4. In the construction of powers originally equitable, the courts of law ought to follow equity; but if they are originally legal, the courts of *Equity* must follow the law. *Ibid.* 266, 7
5. *A.* having a power to limit an estate to the use of such *child* or *children* of the said *A.* and for such estate or estates as she the said *A.* should direct, limit, &c. and having two daughters, *as to one moiety* of the said estate, appoints it to the use of her eldest daughter *B.* for life, with remainder to the first and other sons of her said daughter in tail male, remainder to the daughters of the said *B.* in tail general, remainder to her youngest daughter *C.* for life, with remainder to her first and other sons, &c. remainder to the daughters of the said *C.* in like manner, remainder to the right heirs of the eldest daughter *B*: and so *vice versâ*, as to the *other moiety*. Held, that such appointment is an *excess* of *A*'s power as far as respects the limitation to her *grandchildren*, but good, as to the limitation to her daughters for life. *Adams* v. *Adams.* *Page* 651 657
6. One, under a power reserved in his marriage settlement to lease for 21 years *in possession*, but not in *reversion*, grants a lease to his only daughter for 21 years, to *commence from the* DAY *of the date*. Adjudged a *good* lease. *Pugh* v. *Duke of Leeds.* 714

PRACTICE.

1. One who is in custody at the suit of the plaintiff, in the *Marshalsea Court*, cannot be removed by *habeas corpus ad respondendum*, to answer to the plaintiff for the *same* debt in a new action in the *King's Bench*. *Melsome* v. *Gardner.* 116
2. Where the defendant has not put in bail in time, whereby the bail-bond becomes forfeited, and afterwards gives notice that he will put them in, in order to stay proceedings on the bail-bond, the plaintiff may except to such bail, and it will not be a waver of the assignment. *Boldero* v. *Gray.* *Ibid.* 769

PREROGATIVE.

Vide KING.

PRESCRIPTION.

By a lord of a manor for toll of all goods landed *within the manor* in consideration of *repairing a wharf* within the manor, is good; though the prescription is laid more extensive than the consideration alleged. *Cotton* v. *Smith.* 47

PRESENTMENT.

Vide CERTIORARI, No. 4. TRAVERSE, No. 1.

PRESUMPTION.

1. A grant or charter from the crown (which ought to be by matter of record) may, under circumstances, be presumed, though within time of legal memory; and possession for 350 years was held by the court a sufficient ground of presumption, to be left to a jury. *Mayor of Hull* v. *Horner*. Page 102
2. Though the record be not produced, nor any evidence given of its being lost; yet, under *circumstances*, it may be left to the consideration of a jury, or a court of *Equity*, whether there is not a sufficient ground to presume a charter. *Ibid.* 110
3. *Mere length of time*, short of the period fixed by the statute of limitations, and *unaccompanied* with any *circumstances*, is not of itself a sufficient ground to presume a release, or *extinguishment* of a *quit-rent*. *Eldridge* v. *Knott*. 214
4. A presumption from mere length of time which is to support a right, is very different from a presumption to defeat a right. *Ibid.* 216
5. *Thirty-six* years *sole* and uninterrupted *possession*, by one *tenant in common*, without any account given to, or demand made, or claim set up by the other, or his representatives, was held sufficient ground for a jury to presume an actual ouster of such co tenant. *Doe* v. *Prosser*. 217

Vide LIMITATION.

PRINCIPAL and AGENT.

Vide AGENT. OWNERS and MASTER, No. 2, 3.

PRINCIPAL and SURETY.

Vide BANKRUPT, No. 13.

PRIVILEGE.

1. What facts are not sufficient to shew that the watermen of the Lord Mayor of *London* are privileged from being impressed. *Rex* v. *Tubbs*. 512
2. But though not exempted, it would be an abuse of the right to press them, if they were in the act of rowing the Lord Mayor in his barge. *Ibid.* 518

PROCESS.

In *B. R.* if the plaintiff prove an injury *before the bill filed*, though *after the latitat returned*, it is sufficient; for, by the general course of the court, the bill is the commencement of the suit; and the *latitat*, except where it is replied to the statute of limitations, or to avoid a tender, or where it is given in evidence to support a penal action in point of time, is considered but as *process*. *Foster* v. *Bonner*. Page 454

Vide ARREST: — CORPORATION, No. 3.

PROHIBITION.

1. Denied to the court of Admiralty, where the matter suggested neither appeared on the face of the proceedings, nor was certified by affidavit. *Caton* v. *Burton*. 330
2. Denied to the Ecclesiastical court *after sentence*, where the defendant below (who now applied for it) had set up several claims respecting tithes, but had suffered them to be tried there. *Full* v. *Hutchins*. 422
3. Where matters, triable at common law, arise *incidentally* in a cause, and the Ecclesiastical court has jurisdiction in the principal point, the court will not grant a prohibition to stay trial, unless they proceed to try contrary to the course of the common law. *Ibid.* 424
4. Where matters are essentially triable at common law, if the party come *before* sentence, the court will grant it *for the sake of the trial*: But if the party submit to trial, he is afterwards *too late*. *Ibid.* 424
5. A prohibition lies *after sentence*, where it appears on the face of the libel or proceedings that the Ecclesiastical court has *no cognizance of the cause*; *Secus*, if, there be only a defect of trial. As where the plaintiff has grounded his libel on a custom, he shall not, after it is found against him, obtain a prohibition. *Ibid.* *Ibid.*

Vide CONTRACT, No. 2.

PROMISSORY NOTE.

Vide DECLARATION, No. 5.

PURCHASE. PURCHASER.

Vide Fraud.

Q.

QUAKER.

1. A Quaker's *affirmation* is admissible in an action of debt, upon the bribery act 2 G. 2. c. 24. *Atcheson* v. *Everitt*. Page 382
2. The origin of the sect of Quakers. *Ibid.* 388

QUARTER-SESSIONS.

May proceed by information on stat 5 *Eliz.* c. 4 *sect.* 39. for exercising a trade without having served a seven years apprenticeship. *Farren qui tam* v. *Williams*. 369

Vide Notice, No. 1, 2. Rate, No. 1.

QUIT-RENT.

Vide Presumption, No. 3.

QUO WARRANTO.

1. The court will grant an information in the nature of a *quo warranto*, where the right depends on a point of doubtful law, in order to its being finally determined. *Rex* v. *Sir John Carter*. 58
2. Under what circumstances the court might refuse it, though applied for within twenty years. *Ibid.* 59
3. *Vide* also, as to this point, *Rex* v. *Binstead*. 75

Vide Corporation. Information.

R.

RATE.

1. On appeal to a poor's rate, on the ground of particular persons or particular property being omitted in the rate, the sessions ought not to quash the whole rate, but to amend it in those particulars. *Rex* v. *Inhabitants of Ringwood*. P. 326
2. *Quære*. How far personal property is rateable to the poor under the stat. 43 *El.* c. 2? *Ibid.* *Ibid.*
3. A lessee (under the crown) of lead mines, is rateable to the poor for the profits arising from *lot* and *cope*, which are duties paid him by the adventurers, without risk on his part. *Rowls* v. *Gells*. 451
4. The poor's rate is not a tax on the land, but a personal charge in respect of the land. *Ibid.* 452
5. In general the farmer or occupier, and not the landlord, is liable to this tax. *Ibid.* 453
6. The grantee of the navigation of the river *Ouze*, is rateable to the poor of the parish of *Cardington*, in respect of the tolls arising from a sluice *erected there*, though he himself resides, and the tolls are collected *elsewhere*. *Rex* v. *Cardington*. 581
7. If *A.* rent a quantity of land, together with a mineral *spring* arising therefrom, at a gross yearly rent, he is rateable to the poor for the whole of such rent; though the annual value of the mere land, is only in proportion of 2 to 8 of the reserved rent. *Rex* v. *Miller*. 619
8. If upon an order of sessions, adjudging that certain persons ought to be added to a rate, and ordering the rate to be amended accordingly, the sessions *omit* to state, that such persons had *notice*, or appeared and were heard, it is fatal. *Rex* v. *Churchwardens of Andover*. 564
9. Whether, and in what manner personal property is rateable to the poor. *Ibid.* 564
10. The court will not quash a poor rate unless it be unequal upon the face of it. *Rex* v. *Hardy*. 579
11. Rating the occupiers of lands and the possessors of personal property in different proportions, will not make a rate unequal on the face of it. *Ibid.* 580

Vide Usage, No. 3.

READERSHIP.

If the rector of a parish, by certificate to the bishop, appoint *A. B.* curate of

of the ſaid pariſh till otherwiſe provided of ſome eccleſiaſtical preferment: The readerſhip of the pariſh is not an eccleſiaſtical preferment, within the meaning of ſuch certificate. *Martin* v. *Hind*. *P*. 437

RECOGNIZANCE.

The form of one given in the *King's Bench* by a peereſs, to anſwer an indictment for felony in the Houſe of Lords. 284

RECOVERY, *Common*.

1. What is a ſufficient deſcription of the premiſes to make it good. *Maſſey* v. *Rice et al.* 346
2. There is not ſo much certainty of deſcription required in a recovery, as in an *adverſe* action. *Ibid.* 349—51
3. One deviſes to his daughter an *expreſs eſtate tail*; but afterwards ſays, "ſuch deviſe ſhall be *void as to inheritance of heirs, if ſhe die without children*, and the eſtate ſhall deſcend to his heir male." A recovery ſuffered by the daughter is good, though ſhe afterwards die without iſſue. *Driver ex dim. Edgar* v. *Edgar*. 379
4. A *ſecret feoffment* under a *naked* poſſeſſion, is not ſufficient to ſupport a common recovery by tenant in tail in remainder. *Doe* v. *Horde*. 702
5. A feoffee to the mere intent of becoming tenant to the *præcipe*, is an inſtrument for one purpoſe of *form* only. *Ibid.* 702 and 704

RELEASE.

Though a deed be in the ſhape of a releaſe, if there are ſufficient words, it may operate as a grant, in order to make it good. *Goodtitle* v. *Bailey*. 599

Vide Presumption, No. 3.

REMAINDER.

1. A deviſe "to the uſe of all and every the daughter and daughters of the teſtatrix, and to the heirs of their *body and bodies*, ſuch daughters, if more than one, to take as tenants in common, and not as joint tenants, and for default of ſuch iſſue, to the uſe of the *right heir* of the teſtatrix." Held, "that the daughters take *croſs remainders*." *Wright* v. *Holford*. Page 31
2. The preſumption of law is in favour of raiſing croſs-remainders between *two only*; and againſt raiſing croſs-remainders between *more than two*. But the preſumption in *either* caſe, may be rebutted by manifeſt circumſtances of *intention* apparent on the face of the will. *Pery* v. *White*. 777
3. The ſame rule of conſtruction (No. 2) laid down in *Phipard* v. *Mansfield*. 791

RENT.

1. Plea to avowry for rent, that defendant pulled down a ſummer-houſe, whereby the plaintiff was deprived of the uſe thereof, without ſaying that he was *expelled*, or put out of the ſame, is inſufficient; being a *mere treſpaſs*, and no *eviction*. *Hunt* v. *Cope*. 242
2. But if the plaintiff had pleaded *eviction*, the facts ſtated might have been ſufficient for the jury to have found a verdict in his favour. *Ibid.* 243
3. The mere acceptance of rent by a landlord, for occupation ſubſequent to the time when notice to quit expired, is not *of itſelf* a waver on the part of the landlord of ſuch notice; but it is to be left to the jury *quo animo* the rent was received. *Doe ex dim. Cheny* v. *Batten*. *Ibid.*
4. Acceptance of ſingle rent is a waver of the double rent, given by ſtat. 4 *Geo*. 2. and acceptance of rent ſince the forfeiture of a leaſe (by 4 *Geo*. 2. *c*. 28. *ſect*. 2.) ſeems to have been held a waver of ſuch forfeiture; for it is a penalty. *Ibid.* 245, 6, 7
5. A ſubſequent agreement may by relation operate to make a reſervation of rent from the beginning. *M'Leiſh* v. *Tate*. 781—4

Vide Covenant, No. 7. Lease, No. 1.

REPLEADER.

1. The court will not grant a repleader but where compleat juſtice may be anſwered. *Symmers* v. *Regem.* *Page* 510

2. Where the iſſue is immaterial and a repleader granted, the parties muſt begin from the point of pleading where the immateriality begins. *Ibid.* *Ibid*

REPUBLICATION.

Vide WILL.

RESIDENCE.

Vide PARSON.

REVOCATION.

1. The *mere* act of *cancelling* a will, is *no* revocation, unleſs it be done *animo revocandi.* *Burtenſhaw* v. *Gilbert.* 52

2. A ſubſequent will, though the jury find it to contain a *different* diſpoſition from a former, if the particulars of that difference be unknown, is no revocation of ſuch former will. *Harwood* v. *Goodright.* 87

3. There muſt be an *inconſiſtent* diſpoſition, in the whole, or in part, of the latter deviſe, to revoke the former: And if *in part*, it is a *revocation* in *part* only. *Ibid.* 90

4. If the jury do not find wherein the difference conſiſts, between a former and latter deviſe, the court cannot preſume it. *Ibid.* 91

5. Making a *ſecond* will, is not *in itſelf* a *revocation*, of a *former* ſubſiſting will. *Ibid.* *Ibid.*

6. If a ſubſequent will, either virtually or expreſsly revoking a former will, be deſtroyed, the former, if ſubſiſting, is revived. *Ibid.* 92

7. One, having by will, duly atteſted, deviſed *all his lands to truſtees*, in *truſt* to *ſell*, &c. and out of the intereſt of the monies ariſing by ſuch ſale, to pay an annuity to his wife, legacies to his children, &c. &c. afterwards *obliterates*, *interlines*, and *alters all* the *bequeſts* directed to be paid out of ſuch monies, without atteſting ſuch alterations, &c. and without *republiſhing* his will. Held that the deviſe to the truſtees to *ſell* was not *revoked.* *Sutton* v. *Sutton.* *Page* 812. 814

8. *Quære*, If the ſeveral bequeſts ſo altered, &c. are revoked. *Ibid.*

RIOT.

If perſons riotouſly aſſembled demoliſh the doors and windows of a houſe, and, having thus obtained an entrance, deſtroy the goods and furniture, the hundred are anſwerable in an action on the ſtat. 1 *G.* 1. *c.* 5. *ſ.* 6. for the damage done to the furniture, as well as to the houſe. *Ratcliffe* v. *Eden.* 485

Vide INDICTMENT, No. 2.

ROADS.

Vide HIGHWAY.

ROMAN CATHOLICS.

Vide PAPISTS. TOLERATION.

RULES *of Court.*

1. Shall not be made the inſtruments of fraud. *Gillman* v. *Hill.* 142

2. A rule of court giving a *ſpecific relief*, is a bar to an action for the ſame cauſe; unleſs in a caſe, where, by law, the party is entitled to two different remedies; as upon an illegal arreſt. *Cameron* v. *Reynolds.* 406, 7

S.

SCIRE FACIAS.

Vide PLEADING, No. 6.

SEAMAN.

Vide USAGE, No. 1, 2.

SMUGGLED GOODS.

Vide ACTION, No. 5.

SERVANT,

Vide JOURNEYMAN.

SETT-OFF.

1. In covenant, unliquidated damages arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off. *Howlet* v. *Strickland*. Page 56
2. In an action brought by the assignees of a bankrupt, for money due to the bankrupt, the defendant may plead a set-off of money due from the bankrupt to him: but if some of the counts are for debts arising since the bankruptcy, he cannot plead a set-off as to those counts. *Ridout*, &c. v. *Brough*. 133

Vide COVENANT, No. 1.

SETTLEMENT.

1. One, *after* marriage, makes a settlement of certain premises upon himself for life, remainder to his wife for life, remainder to their issue in tail; and three years afterwards, mortgages the premises to *B.*, who was told that there was such a settlement. The settlement is void, (as against the mortgagee,) within the stat. 27 *Eliz. c.* 4. *Chapman* v. *Emery*. 278
2. A remote reversion in fee, was held to pass under *general words* in an act of parliament, by way of settlement in execution of marriage articles, though the reversion was not particularly in contemplation at that time; the words being sufficient to carry it, and the intention being to include *all* the estate of the testator. *Freeman* v. *The Duke of Chandos*. 360
3. *A.*, (being indebted,) by settlement *before* marriage, in consideration of marriage and his wife's portion, which was supposed to amount to more than his debts, conveyed all his real estate, and likewise his *household goods*, (the real estate not being thought adequate,) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons in strict settlement. The settlement was *approved* by a *Master in Chancery*, and the goods enumerated in a schedule. *A.*, after the marriage, *continued in possession* of the goods: afterwards *a creditor at the time of the settlement*, having obtained judgment, took them in execution. Held, the settlement was good against creditors, and the trustees entitled to the possession of the goods. *Cadogan* v. *Kennet*. Page 432
4. But if the settlor in such case (No. 3.) had let the house and furniture, reserving one rent for the house, and another for the furniture; or if the rent could be apportioned, the creditors would be entitled to the share of such rent reserved, or to such apportionment of it, in respect of the goods. *Ibid.* 436
5. So, if money in the funds were included under such settlement, the creditors would be entitled to the dividends during the debtor's interest. *Ibid.* *Ibid.*
6. *Vide* the rule made in the above cause (by consent) agreeable to the above principles. (No. 4 & 5.) 437

Vide FRAUD.

SHERIFF.

1. Actions for breach of duty of the office of sheriff, must be brought against the *high sheriff*, though by default of the under sheriff or bailiff. *Cameron, et al.* v. *Reynolds*. 403
2. An action does not lie against the sheriff, upon a promise to execute a bill of sale to the plaintiff's nominee. *Ibid.* 406
3. The legal and proper mode of compelling a sale by the sheriff, is by writ of *venditioni exponas*. *Ibid.* *Ibid.*

SHIP,

Vide LIEN.

SLANDER.

1. The *colloquium* was of the death of *D.*, and the words were, "I am "thoroughly convinced that you are "guilty (*innuendo*, of the *death* of "*D.*) and rather than you should "go

"go without a hangman, I will hang "you." Also another count was, "You are *guilty*, (*innuendo*, of the "murder of *D*") Held good after verdict. *Peak* v. *Oldham*. *Page* 276

2. "Guilty of the death," necessarily imports a charge of murder. *Aliter*, had it only been that he was the the *cause of the death*; for a man may innocently be the cause of another's death. *Ibid.* *Ibid.*

STATUTES.

1. It is a general rule that subsequent statutes, which only add accumulative penalties, do not repeal former statutes. *Rex* v. *Jackson.* 297-8
2. In remedial cases, the construction of statutes is extended to other cases within the reason or rule of them. *Atcheson* v. *Everitt.* 391
3. But where it is a hard positive law, and the reason is not very plain to be seen, it ought not to be extended by construction. *Ibid.* *Ibid.*
4. Strong words in the enacting part of a statute, may extend it beyond the preamble. *Pattison* v. *Banks.* 543

TABLE OF THE DIFFERENT STATUTES CITED.

HENRY III.

An. Regn.			
9.	*Magna Charta*	*c.* 35.	p. 15.
52.	*Marlbr.*	*c.* 10.	15.

EDWARD I.

13. *stat.* 1.	*c.* 18.	p. 709. 713.
28.	*c.* 20.	297.

RICHARD II.

6. *stat.* 1.	*c.* 2.	177.

HENRY VI.

2.	*c.* 14.	p. 297.

HENRY VII.

4.	*c.* 24.	p. 707.

HENRY VIII.

	c. 13.	p. 130. 366.
	c. 5.	80.
	c. 15.	366.
	c. 8.	——
	c. 10.	89.
	c. 16.	718.

HENRY VIII.

An. Reg.		
27.	*c.* 25.	p. 555.
31.	*c.* 13.	707.
32.	*c.* 9.	——
—	*c.* 30.	392.
—	*c.* 34.	707.
33.	*c.* 9.	36.

EDWARD VI.

1.	*c.* 3.	555.
5 & 6.	*c.* 2.	——

PHILIP & MARY.

1 & 2.	*c.* 12.	611, 12.

ELIZABETH.

5.	*c.* 3.	555-6.
—	*c.* 4.	369.
13.	*c.* 3.	398.
—	*c.* 5.	434.
—	*c.* 7.	399. 746.
—	*c.* 20.	129.
14.	*c.* 5.	556.
18.	*c.* 3.	——
—	*c.* 5.	366.
—	*c.* 15.	297.
27.	*c.* 4.	279. 434. 705 to 714.
—	*c.* 13.	383.
39.	*c.* 3.	615.
—	*c.* 21.	556-7 8.
43.	*c.* 2.	79. 551-4-7-8-9.

JAMES I.

1.	*c.* 15.	399. 746.
4.	*c.* 3.	366.
7.	*c.* 5.	643-4.
21.	*c.* 19.	232. 399. 746. 750.
—	*c.* 28.	297.

CHARLES I.

22.	*c.* 12.	559. 615.

CHARLES II.

12.	*c.* 24.	709. 713.
—	*c.* 35.	759, 760.
13. *stat.* 2.	*c.* 1.	393. 540.
13 & 14.	*c.* 11.	805.
16.	*c.* 7.	282.
16 & 17.	*c.* 8.	392.
17.	*c.* 8.	71.

CHARLES II.

An. Reg.		
22.	c. 12. p.	78.
29.	c. 3.	228.
—	c. 7.	640. 647.

WILLIAM & MARY.

1.	c. 12.	67.
—	c. 18.	389.
2.	c. 8.	615.
3 & 4.	c. 12.	616.
5 & 6.	c. 11.	136.

WILLIAM III.

7 & 8.	c. 34.	392.
—	c. 7.	——
8.	c. 8.	297.
8 & 9.	c. 11.	357.
9 & 10.	c. 15.	23.
10 & 11.	c. 23.	334.
12.	c. 4.	465. 468.
12 & 13.	c. 3.	844, 5.

ANNE.

5.	c. 14.	612.
—	c. 31.	334.
8.	c. 19.	623, 4.
9.	c. 10.	183. 625. 629. 754, 5. 7, 8, 9, & 765.
—	c. 14.	281.
—	c. 20.	76.
12 *stat.* 2.	c. 16.	113. 671.

GEORGE I.

1. *stat.* 1.	c. 5.	485.
— *stat.* 2.	c. 6.	391.
—	c. 12.	755.
—	c. 52.	616.
5.	c. 6.	539.
—	c. 13.	426.
6.	c. 11.	297.
—	c. 21.	763.
—	c. 48.	60.
7.	c. 31.	540. 743.
8.	c. 6.	391.
—	c. 7.	523.
—	c. 18.	610.
9.	c. 22.	367.
11.	c. 30.	728.

GEORGE II.

2.	c. 22.	57. 134.
—	c. 24.	382.
4.	c. 26.	392.

GEORGE II.

An. Reg.		
4.	c. 33.	183. 625. 629.
5.	c. 30.	23. 70. 134. 156. 542, 3. 7. 550.
8.	c. 24.	57.
11.	c. 19.	782, 3.
12.	c. 26.	298.
14.	c. 22.	704.
17.	c. 5.	36.
19.	c. 2.	489.
—	c. 37.	583, 4, 5.
20.	c. 52.	136.
22.	c. 30.	384.
30.	c. 24.	24.
32.	c. 28.	136.

GEORGE III.

1.	c. 1.	755.
—	c. 7.	67, 8, 9.
3.	c. 15.	192.
5.	c. 25.	183.
8.	c. 38.	586.
9.	c. 26.	138.
10.	c. 39.	67.
11.	c. 1.	68.
12.	c. 23.	22, 3.
—	c. 47.	138.
13.	c. 43.	67, 8, 9.
—	c. 78.	78. 648, 9, 650.
—	c. 84.	365. 649, 65.
14.	c. 48.	737.
—	c. 82.	365.
15.	c. 25.	738. a private act.
16.	c. 34.	744.
—	c. 38.	527, 8.
17.	c. 46.	791.

SURPRISE.

1. If a rector, by certificate to the bishop, appoint a person his curate, with a promise to allow him a salary and to continue him in such office of curate, till he is preferred, or lawfully removed for some fault, if he afterwards remove him *without cause*, and the curate bring an action for his salary, the rector shall not justify such removal by an accusation of irregularity in the plaintiff's morals or conduct, produced for the first time, by surprise, at the trial of the cause. *Martin* v. *Hind*. 441

 2. In

2. In an action for money had and received, brought to try, Whether the defendant was entitled to take certain fees from the plaintiff under an act of parliament, if the parties go to trial upon an apprehension that that was the only question to be tried, the plaintiff shall not be permitted to surprise the defendant at the trial, by starting another ground upon which to recover a *Norfolk* groat. *Stevenson* v. *Mortimer*. *Page* 807

T.

TENANT *in Common*.

1. THE possession of one, shall be said to be the possession of the other, when he holds possession as *such*, and receives the rents and profits on account of both. *Fisher et al.* v. *Prosser*. 219
2. A devise of lands to *three*, "*equally*," is a *tenancy in common*. *Den* v. *Gaskin*. 660

TOLERATION.

1. All the consequences of the act of toleration 1 *Wm.* & *Mary*, *c.* 18. ought to be pursued with the greatest liberality in ease of the scrupulous consciences of dissenters on the one hand; but so, as those scruples of conscience should not be prejudicial to the rest of the King's subjects. *Atcheson* v. *Everitt*. 388
2. For a scruple of conscience entitles a party to indulgence and protection, so far as not to suffer for it, but it is of consequence that the subject should not suffer too. *Ibid.* *Ibid.*
3. A dissenter from the church of *England*, is not guilty of a crime, barely by entertaining such religious opinion. *Ibid.* 393

TOLL.

1. Distinction between toll *thorough* and toll *traverse*. For the *first*, a consideration must be laid; for toll traverse, it need not; it is implied. *Colton* v. *Smith*.
2. The additional toll to be paid by waggons overweight, must be according to the progressive proportions named in stat. 14 *Geo.* 3. *c.* 82. *s.* 2. not a *gross* charge upon the overweight at the highest additional toll incurred. *Chamberlain et al.* v. *Songhurst* *Page* 365

Vide PRESCRIPTION. ACTION, No. 14. DISTRESS. No. 1.

TRAVERSE.

1. A presentment in a court leet may be removed into the court of *B. R.* and traversed *there*. *Rex* v. *Roupell*. 458, 60

TRESPASS, *vi et armis*.

1. Trespass and false imprisonment lies in *England* by a native of *Minorca*, against the governor of that island, for an injury of that nature, committed in *Minorca*. *Mostyn* v. *Fabrigas*. 161
2. Trespass does not lie against a pound-keeper merely for *receiving* cattle, though the taking were tortious; for he is bound to keep whatever is brought to him. *Secus*, if he goes beyond his duty, and assents to the trespass. *Badkin* v. *Powell*. 476

TRIAL.

1. There is a *formal* and a *substantial* distinction as to the *locality* of trials. *Mostyn* v. *Fabrigas*. 176
2. The *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. As in ejectment. *Ibid.* *Ibid.*
3. *Quære*, If such *substantial* distinction of locality, does not exist also, with regard to matters that arise *out* of the realm? As if two persons were to fight in *France*, and both happening to be in *England*, one should bring an action of assault against the other; because the breach of the peace, which must be laid in the declaration, is merely *local*, though the trespass against the person is transitory. *Ibid.* *Ibid.*
4. The *formal* distinction arises from the *mode* of trial, *viz.* by *jury*. *Ibid.* *Ibid.*
5. This latter extends to all cases that arise abroad, with a distinction, however,

however, between *transitory* and *local* actions. *Ibid.* *Page* 176
6. *Vide* this distinction exemplified and illustrated. 177—181

TROVER.

1. Does not lie against an executor for a conversion by his testator. *Hambly* v. *Trott*, administrator. 371
2. It is in *form* a fiction, in substance founded on property. *Ibid.* 374
3. Does not lie by the assignees under a joint commission of bankrupt, against the vendee of goods disposed of, *bonâ fide*, by one partner some time *before his own* bankruptcy; but *after* a secret act of bankruptcy by the other partner. *Fox* v. *Hanbury*. 415
4. What is a sufficient affidavit to hold to bail in trover. *Charter* v. *Jacques*. 529
5. If money and a horse are given in exchange, for another horse *warranted sound*, which was unsound at the time, *trover* will not lie to recover the horse given in exchange, because the *property* is *altered*. *Power* v. *Wells*. 814

Vide Bail, No. 6.

TRUST and TRUSTEE.

1. If land be devised to persons, in aid of personal estate, for payment of debts, &c. and the personal estate proves deficient, the devisees, when they have paid this charge, become trustees for the person entitled to the surplus; *viz.* for the residuary devisee, if there be one; if not, for the heir at law; for it is a resulting trust. *Hart* v. *Knott*. 46
. An estate in trust *merely for the benefit of cestui que trust*, shall not be set up against him. *Ibid.* *Ibid.*

Vide Devise, No. 2. 15. Ejectment, No. 1.

U.

USAGE.

1. THE power of impressing seafaring men, &c. is founded on *immemorial usage*; and there may be a right of exemption on the same foundation. *Rex* v. *Tubbs*. 512
2. What facts have been held insufficient to prove such an exemption. *Ibid.* *Ibid.*
3. Where it has been the usage in a parish to rate persons to the poor for their *stock in trade within the parish*, such persons are liable in respect thereof. *Rex* v. *Hill*. 613-619
4. Whether usage is material under the stat. 9 *Ann.* c. 10, and 4 *Geo.* 2. c. 33. *Jones* v. *Walker*. 624

USES.

Though lands are comprehended in the general sweeping clause of a deed of settlement (to certain uses), yet, if no use be declared of them, they descend to the heir. *Moore* v. *Magrath*. 9

Vide Deed.

USURY.

1. If a tradesman sell goods at three months credit; and stipulate, in case the money is unpaid, that the vendee shall allow him a halfpenny an ounce *per* month, till he discharges the debt; this allowance, though above the legal rate of interest, yet, being the *usage* in that trade, and the contract being a *bonâ fide* sale, is not usurious. *Otherwise*, if it be merely a *colour* to cover a *loan*, and to evade the statute. *Floyer* v. *Edwards*. 112
2. Where it is in the power of a borrower of money to pay the principal within a limited time, without interest; upon non-payment, the reservation of a larger sum than the statute allows, is no usury. *Ibid.* 115
3. An usurious contract must be proved as laid. *Carliste qui tam.* v. *Trears*. 671
4. On a rule to vacate a judgment confessed, and to stay proceedings on the *sci. fa.* upon an allegation that the consideration of the warrant of attorney was usurious, the court will

will direct an issue to try the usury, and enlarge the rule in the mean time. *Cook* v. *Jones*. *Page* 727-8

5. Usury cannot be pleaded to a *scire facias* on a judgment. *Ibid.* *Ibid.*

6. If the substance of a contract be a borrowing and lending, a slight colourable contingency only, will not take it out of the statute of usury. *Richards qui tam* v. *Brown*. 770

7. If *A.* upon a loan of money, stipulate to have *half the profits* upon a resale of goods to be purchased by the borrower, which profits *exceed* 5 *l. per cent.* and *A.*'s principal is not risked, *quære*, if such contract be *not usurious*? *Jestons* v. *Brooke*. 793

V.

VARIANCE.

1. BETWEEN a bond and the declaration upon it. *Mostyn* v. *Fabrigas*. 178

2. Variance by putting undertood for understood, in an indictment for perjury, held not material. *Rex* v. *Beach*. 229

3. The true distinction seems to be, that, *where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material*. *Ibid.* *Ibid.*

4. Variance, in a declaration of *assumpsit* for a sum given by a judicature established by stat, 4 & 5 *Phil.* & *Mary*, by describing the stat. as the 4th of *P.* & *M.* is fatal. *Rann* v. *Green*. 474

5. Declaration against the defendant as assignee of *all* the estate, &c. in certain premises; evidence that he is assignee of *part* only, is a fatal variance. *Hare* v. *Cator*. 765

Vide CUSTOM, No. 2.

VENDOR and VENDEE.

1. If a vendor actually takes upon himself to deliver the goods to the vendee, he stands to all risks; but, if the vendee order a particular mode of conveyance, the vendor is excused, and the vendee must stand to any loss that may happen. *Vale* v. *Bayle*. *Page* 294

2. Thus, when the vendee wrote in these words, "I beg you will send "them by *land-carriage*, as they are "detained a long time at *Bristol* be- "fore they arrive": The vendor delivered them to the book-keeper of the *Birmingham* carrier, which was *the only mode of sending them by land carriage*; and the goods were lost; adjudged that this was a good delivery to the vendee. *Ibid.* *Ibid.*

3. But, while the goods are *in transitu*, the vendor has such a lien upon them, as to be permitted to get them back, if the vendee, in the mean time, has become a bankrupt. *Ibid.* *Vide also* *Birkett* v. *Jenkins*, *East.* 11 G. 3. *cited*, *Ibid.* 296

4. If vendor sell goods by sample, to be delivered to the vendee within a month, and take earnest; and within a month send them by his servant to the premises, where, part being unloaded, the rest are distrained for toll; *the delivery is complete*, so as to entitle the *vendee* to bring *trespass* for the seizure. *Blakey* v. *Dinsdale*. 664

5. So it was, to all honest purposes, in respect of *third* persons, the moment the vendor had delivered the goods to his own servant, to carry to the vendee. *Ibid.* *Ibid.*

VENUE.

1. When an action is brought in *England*, upon a deed dated in foreign parts, a place in *England* must be alleged in the declaration, *pro formâ*. *Mostyn* v. *Fabrigas*. 178-9

2. Every transitory action may be laid in any county in *England*, though the matter arise beyond the seas. *Ibid.* 181

3. The plaintiff was allowed to bring back the venue to *London*, (where it had been at first laid,) though the cause had gone down to trial, and had

had been a *remanet* for want of jurors. *Bruckshaw* v. *Hopkins.* Page 409

4. The court will not change the venue (to the county in which the cause of action arose) where an impartial or satisfactory trial cannot be had; as in an action for words spoken at an election. *Petyt* v. *Berkeley.* 510

5. The venue may be changed after an order for time to plead, though upon the terms of pleading issuably; but *not* after such an order where the terms are to plead issuably, *and take short notice of trial at the first sittings. Ibid.* 511

VERDICT.

1. A verdict will not aid, where the gist of the action is not laid in the declaration. But it will cure ambiguity. *Avery* v. *Hoole.* 826

2. The want of a bill in the *King's Bench*, and the want of an original in the *Common Pleas*, are both cured after verdict. *Foster* v. *Bonner.* 455

Vide SLANDER, No. 1.

VISITOR.

1. Is only to decide private disputes between the members of the college; and not a suit by a third person against the whole body. *Rex* v. *Wyndham.* 378

2. So, where an estate is in the college, and they are to act in a trust, the visitor cannot meddle in a matter which is the subject of such trust. *Ibid.* *Ibid.*

Vide COLLEGE.

W.

WAGERS.

1. AN action lies to recover money won upon a wager, "Whether a decree of the court of *Chancery* would be reversed or not, on appeal to the House of Lords?" Unless there be any fraud, or circumstances that shew the motive to have been immoral or corrupt. *Jones* v. *Randall.* Page 37

2. If the wager had been made with one of the Lords, or one of the Judges, or with a counsel or attorney, *in the cause*, it would have been illegal. *Ibid.* 39. 40

3. An agreement, that in consideration the plaintiff had agreed to pay the defendant 20*l.* at the next port, the defendant undertook that the ship should save her passage to *China* that season; and in case she did not, he would pay to the plaintiff 1000*l.* at the end of one month after her arrival in the river *Thames*, is a *wagering* policy within the stat. 19 *G.* 2. *c.* 37. though the plaintiff had some goods on board, liable to suffer by the loss of the season; but there was no reference (in the agreement) to property. *Kent* v. *Bird.* 583

4. An action will not lie upon a *voluntary wager* between two *indifferent* persons, on the *sex* of a third person, who has appeared and acted as a man. 1. Because such enquiry tends to *indecent evidence.* 2. Because it tends to *disturb the peace* of the individual, and of *society. Da Costa* v. *Jones.* 729-736

5. Wagers in general are allowed, unless where restrained by statute. *Ibid.* 734

6. But where a wager is laid upon a subject that tends to a breach of the peace, or a violation of chastity, or that is *contra bonos mores*, it is unlawful. *Ibid.* 735

7. So, if it affect the interest or feelings of a third person. *Ibid.* *Ibid.*

8. But wherever a question arises upon a real matter of right, it shall be tried, though the interest of third persons, not parties, may be affected by it. *Ibid.* 736

9. A policy, on the *sex* of a person, is a wagering policy within the stat. 14 *G.* 3. *c.* 48. by which "all insurances upon lives, or any other "event or events, without interest "in

"in the parties, are made null and "void." *Roebuck* v. *Hammerton*. *Page* 737

WARRANT of ATTORNEY.

1. The court will not set it aside on account of its being given by a defendant in custody without an attorney present on his part, if executed by the defendant purposely with a view to cheat the plaintiff. *Gillman* v. *Hill.* 141
2. It is *good*, if given by one in custody under an *execution*, though no attorney be present on his behalf. For the rule of *East.* 15 *Car.* 2. does not extend to it. But if the party had been prevailed on to acknowlege it, &c. for more than was due, the court would give relief under circumstances. *Fell* v. *Riley.* 281

WARRANTY,

Vide Assumpsit, No. 17. Insurance. Trover, No. 5.

WILLS.

1. One, having made his will and a *duplicate* thereof, delivers the duplicate to another person. Afterwards he makes another will, by which he revokes all former wills, and at the same time he *cancels that part* of the former will which was in his own custody. Before his death, he sends for an attorney to make a *third* will; but is senseless before the attorney arrives. After his death, the first and second will are found together in a paper, *both cancelled*; but the duplicate of the first is found *uncancelled* amongst his other deeds and papers. The act of cancelling the *second* will, does not set up the duplicate of the first. *Burtenshaw* v. *Gilbert.* 49
2. Where there are *duplicates* of a will, one in the testator's custody, the other not; his cancelling the one in his custody, is an effectual cancelling of both. *Ibid.* *Ibid.*
3. One having made his will, and devised all his freehold and copyhold lands to certain uses, afterwards purchases other copyholds, which he surrenders thus: "To the uses *de*"*clared* or to be declared by his last "will and testament." This amounts to a *republication*, and the newly purchased copyholds shall pass to the uses of the will. *Heylyn* v. *Heylyn*. *Page* 130
4. When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. *Ibid.* 132
5. There is no republication in equity, that is not so in law. *Ibid.* *Ibid.*
6. One, having by will devised *all* the *residue* of his estate, of what kind or quality soever to *W. P.* afterwards purchases copyhold lands, and surrenders them to such uses as he *shall* by his last will declare, limit, and appoint. He afterwards makes a codicil, and thereby *ratifies* and confirms all and every the gifts, devises, and bequests in his said will, *except* what he had *altered* by the codicil; and desires the codicil may be annexed to, and taken as part of his will to all intents and purposes. This amounts to a republication of the will, so as to make the after purchased copyhold lands pass by the residuary devise. *Doe* v. *Davy*. 158

WITNESSES.

1. If a party wants the testimony of witnesses whom he cannot compel to attend, the court may put off the trial from time to time, till the other party consents that depositions shall be taken where they are. *Mostyn* v. *Fabrigas.* 174
2. A servant or clerk, who has embezzled money or notes of his master's, is an admissible witness (provided he has a release) against the person who received such money or notes from him,

him, on an action for money had and received, brought by his master to recover the amount. *Clarke* v. *Shee*. *Page* 199

3. A tenant in possession is not a good witness to prove his landlord's possession, or to support his title, because it is to uphold his own possession. *Doe* v. *Foster*. 621

Vide Affidavit, No. 1. Attorney, No. 2, 3, 4. Bankrupt, No. 2, 3.

WORDS.

1. Courts of justice are to construe the words of parties, so as to *effectuate* their *deeds*, and *not* to *destroy* them; more especially where the words themselves *abstractedly* may admit of either meaning. *Pugh* v. *Duke of Leeds*. 725

2. The word "from," may, in the vulgar use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*. *Ibid*. *Page* 717-25

3. Therefore, where tenant for life, with a *power* to lease in *possession* and *not* in *reversion*, granted a lease to his only daughter for twenty-one years, to commence "*from* the day of "the date," the court held, that the parties understood and used the word "from" in that sense, which would make their deed effectual, and accordingly adjudged it a lease in possession. *Ibid*. *Ibid*.

WRITS.

Where a writ is taken out in the Vacation, and tested the last day of the Term, you cannot contradict the fiction, *so as to invalidate the writ*; but for any other purpose (such as taking a debt out of the statute of limitations) you may. *Mostyn* v. *Fabrigas*. 178

FINIS.

New and improved Editions of LAW BOOKS, *in Royal Octavo, published and sold by* E. *and* R. BROOKE *and* J. RIDER.

ATKYNS's Reports in Chancery in the time of Lord Hardwicke; with additional Notes and References to modern Determinations, and to the Register's Book. By F. W. SANDERS, Esq. in 3 Volumes, price 2 *l.* 5 *s.*

BURROW's Reports in the King's Bench in the time of Lord Mansfield; in 5 Volumes, price 3 *l.* 10 *s.*

BARNES's Notes of Cases of Practice in the Common Pleas, from 1732 to 1756; with a Continuation of the Cases to the End of the Reign of George II.; 1 Volume, 12 *s.*

BROWN's Reports in Chancery in the time of Lord Thurlow.
[*A New Edition, with Corrections and additional References, will shortly be published, in* 4 *Volumes, royal* 8*vo.*]

BACON's New Abridgment of the Law. FIFTH EDITION, corrected, with considerable Additions, including the latest Authorities. By HENRY GUILLIM, Esq. Barrister at Law, 7 Volumes, price 5 *l.* 15 *s.* 6 *d.*

BRIDGMAN's Thesaurus Juridicus: being a Digest of the Decisions of the several Courts of Equity from the Revolution to 1798. Vol. 1 and 2, in Boards, Price 1 *l.* 10 *s.*
[*This Work is intended to consist of* 6 *Volumes.*]

COKE upon LITTLETON; or the First Part of the Institute of the Laws of England, with the Notes of Sir Matthew Hale, and the Additions of Francis Hargrave and Charles Butler, Esqrs. of Lincoln's Inn. FIFTEENTH EDITION, printed on Wove Paper, 3 Volumes, price 2 *l.* 12 *s.* 6 *d.*

COKE's Institutes of the Laws of England, in FOUR PARTS; including, I. The Commentary on Littleton, with the Notes of Lord Hale, and of Hargrave and Butler. II. A Comment on Magna Charta and other Antient Statutes. III. On the Pleas of the Crown. IV. On the Jurisdiction of Courts, with Translations of the Ancient Statutes, and other Improvements, 7 Volumes, price 4 *l.* 7 *s.*

COMYNS's Digest of the Laws of England, corrected and continued to the present Time. By SAMUEL ROSE, Barrister at Law. 6 Vol. 4 *l.* 4 *s.*

CROKE's Reports in the Courts of King's Bench and Common Pleas in the Reigns of Queen Elizabeth, and Kings James and Charles, with additional Marginal Notes and References; by THOMAS LEACH, Esq. 4 Volumes, price 3 *l.*

DOUGLAS's Reports in the King's Bench; Third Edition; with additional Notes of cited Cases, and other References; 2 Volumes, price 1 *l.* 4 *s.*

FOSTER's

LAW BOOKS *published by* BROOKE *and* RIDER.

FOSTER's Reports of Crown Cases, with Discourses on several Branches of the Crown Law; THIRD EDITION. To which is added, an Appendix, containing Sir M. Foster's Arguments in several important Cases, never before published; with Notes and References by his Nephew, MICHAEL DODSON, Esq. 1 Volume, price 12*s.*

HALES's History of the Pleas of the Crown; with an Abridgment of the Statutes relating to Felonies since the original Publication in 1736. 2 Vols. price 1*l.* 11*s.* 6*d.*

MODERN REPORTS; being select Cases in the Courts of King's Bench, Common Pleas, Chancery, and Exchequer; from the Restoration of Charles II. to the End of the Reign of George I.; with additional Cases and Notes, and References to more modern Authorities; by THOMAS LEACH, Esq. 12 Volumes, price 7*l.* 7*s.*

LORD RAYMOND's Reports and Entries in the Courts of King's Bench and Common Pleas, in the Reigns of King William III. Queen Anne, King George I. and II. Fourth Edition, corrected, with additional Notes and References; by JOHN BAYLEY, Esq. 3 Volumes, price 2*l.*

SALKELD's REPORTS in the King's Bench, during the Reigns of King William III. and Queen Anne; with some special Cases in Chancery, Common Pleas, and Exchequer; Alphabetically digested under Heads; Sixth Edition, with large Additions of Notes and References to modern Authorities and Determinations; by W. D. EVANS, Esq. Barrister at Law; 3 Volumes, price 1*l.* 11*s.* 6*d.*

STRANGE's Reports in the Courts of King's Bench, Common Pleas, Chancery and Exchequer, in the Reign of King George I. and II. THIRD EDITION, with Notes and additional References to Contemporary Reporters, and to later Cases; by MICHAEL NOLAN, Esq. Barrister at Law; 2 Volumes, price 1*l.* 10*s.*

SHEPPARD's Touchstone of Common Assurances with large Additions of Notes. By EDWARD HILLIARD, Esq. of Lincoln's Inn. One Volume, price 15*s.*

VINER's Abridgment of the Law. A new Edition, in 24 Volumes, price 16*l.* 16*s.*

[*A Supplement to the above valuable Work, containing an Abridgment of the Reports of the last Five Years, is now publishing, of which the First and Second Volumes may now be had, price* 1*l.* 8*s. which will shortly be followed by the succeeding Volumes.*]

WILLIAMS's (William Peere) Reports of Cases in Chancery, &c. FIFTH EDITION, with Additional Notes and References to the proceedings of the Court, and the Register's Book, and to later Cases. By SAMUEL COMPTON COX, Esq. of Lincoln's Inn, Barrister at Law; 3 Volumes, price 2*l.* 5*s.*

WILSON's (Serjeant) Reports of Cases in the King's Bench and Common Pleas in the Reign of George II. and George III. Third Edition, with some Additions and References to modern Cases; 3 Volumes, price 1*l.* 18*s.*

Printed by A. Strahan, Law Printer to His Majesty, Printers-Street, London.